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LECTURES ON THE AMERICAN CONSTITUTION

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BY

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PREFACE

THIS book is the fruit of a course of six lectures delivered in the University of Cambridge in the Lent term of the present year (1938).

In venturing to reproduce them in book form I have been fortified by the belief that, while the American Constitution has at all times since its adoption been an object of interest to Englishmen, that interest is exceptionally lively at the present time.

I have abstained, almost entirely, from considering the Constitution as a political machine. For this abstention considerations of space alone provided a sufficient reason. But an independently adequate reason was to be found in the fact that the ground has recently been covered on an ample scale and in an admirable manner.[1]

My chief pre-occupation has been with Constitutional Law, an aspect of the American system of government to which writers on this side of the Atlantic have, in general, given less attention than it deserves. There is, so far as I know, no modern book which attempts to illustrate, for English readers, the cardinal position of the Supreme Court, by expounding the main applications of the Commerce Clause, the Contract Clause, and the 14th Amendment.

I have not attempted to carry my recital beyond the year 1937.

[1] *The American Political System*, D. W. Brogan. Hamish Hamilton, 1933.

In citing decisions of the Supreme Court, I have contented myself with the names of the parties and the year. These are sufficient indications to enable any reader who wishes to do so to trace the cases referred to in the reports.

M. S. A.

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ABBREVIATIONS

BRYCE—Lord Bryce, *The American Commonwealth*, 3rd ed., 1893.

CALVERT—Thomas H. Calvert and William M. Meigs, *The Constitution and the Courts*, 3 vols., 1924.

HORWILL—W. H. Horwill, *The Usages of the American Constitution*, 1930.

MCLAUGHLIN—A. C. McLaughlin, *A Constitutional History of the United States*, 1936.

MUNRO—W. B. Munro, *The Makers of the Unwritten Constitution*, 1930.

REED—T. H. Reed, *Form and Functions of the American Government*, 1919.

WARREN—Charles Warren, *The Supreme Court in United States History*, 2 vols., 1937.

WILLIS—H. E. Willis, *Constitutional Law*, 1936.

LECTURES ON THE AMERICAN CONSTITUTION

LECTURE I

THE ORIGINS; THE PRESIDENT; AND THE CONGRESS

THE subject of these lectures is the Constitution of the United States. And I must begin by explaining what is meant by that term.

The term "the Constitution" is used in a more precise sense by Americans than it is by Englishmen. The British Constitution includes, as we all know, a few fundamental laws, such as the Act of Settlement, the Habeas Corpus Act, and the Parliament Act; but it contains a much larger category of customs, conventions, and usages which, though regarded by us as very important, are not laws of a kind which a court would enforce. To an American, on the other hand, the Constitution means a single great fundamental Statute, the Statute under which the American Union was brought into existence, and under which, with its subsequent amendments, the Union has been governed and developed for the last 150 years. Both Constitutions are a blend of the political and the legal; but while the British Constitution is primarily thought of by us as a political fact, I think it is true to say that the American Constitution is primarily thought of by Americans as a legal fact; and lawyers and Courts of law have a great deal more to do with the practical operation of the American system than they have with the British system.

It is evident that no Constitution, even so legalistic a Constitution as that of the United States, can be fully understood by a student who confines his inquiries to constitutional law. To learn how the system in fact works

it would be necessary to investigate such matters as the organization and history of the political parties and the part played by them, the traditions and usages providing for and governing political leadership, the formulation of policies, the actual distribution of effective political power and responsibility, the financial system, and the rules governing the management of business in the legislative assemblies. To these important topics I shall, in these lectures, give only incidental attention, and shall chiefly concern myself with Constitutional law. For interesting as is what I may call the extra-legal political life of the American Union, to a lawyer at any rate the political conflicts fought and decided in the Court room are even more interesting. To which I may add, as further justification, first, that the time I can ask you to give me is limited; and, second, that while American Constitutional law can be studied in an English library, American political life cannot.[1]

It is, I think, a prudent rule for a lecturer not to assume that his hearers bring with them to his lecture room a complete and recent familiarity with the subject of his discourse. And I shall, therefore, with due apologies, begin with a brief statement of some fundamental facts, including a few dates.

The first shot in the Revolutionary War was fired on 18 April, 1775. The Declaration of Independence was adopted on 4 July, 1776. On 9 July, 1778, the Articles of Confederation were adopted, establishing the military league between the States from which the Federal Constitution was afterwards developed. On 19 October, 1781, Lord Cornwallis surrendered at Yorktown, thus bringing the Revolutionary War to an end. The Treaty of Paris, by

[1] For books on the political life of America I may refer in the first instance, of course, to Bryce's *American Commonwealth*; to President Wilson's brilliant study *Congressional Government*, which, though somewhat out of date, has not been replaced (last edition, with introduction by R. S. Baker, 1925); to T. H. Reed's *Form and Functions of the American Government*, 1919; to P. O. Ray's *Introduction to Political Parties and Practical Politics*, 3rd ed. 1929; and to Mr. D. W. Brogan's book *The American Political System*, 1933.

which Great Britain recognized American Independence, was signed on 3 September, 1783. Four years later, on 25 May, 1787, there met in Philadelphia the convention of fifty-five men who drafted the Constitution. They terminated their labours on 17 September of the same year, and, when the new plan of government had been ratified by popular conventions in eleven of the thirteen States, the Constitution was brought into operation under the presidency of George Washington as from the 4th of March 1789, on which day the first Congress assembled at Philadelphia.[1]

The Articles of Confederation

As I have already said, the Constitution replaced an earlier instrument of union, known as the Articles of Confederation, which were adopted in 1778.[2] These articles, although directed to the limited though urgent object of establishing a defensive league between the States, contain provisions and language which we shall meet again later on as forming important elements in the law of the Constitution.

The first article proclaimed the name of the new nation as "the United States of America."[3]

The fifth article established, "for the more convenient management of the general interest of the United States," a Congress of one chamber, composed of delegations from the thirteen participating States, each delegation to have one vote. The Congress was to meet annually on the first Monday in November; and while it was not in session its powers, or such of its powers as nine States might agree to, were to be exercised by a Committee composed of a delegate from each State. No delegate was to hold salaried office

[1] It is a striking fact that it was only two months later, in May of the same year, that the French Revolution was to be inaugurated by the meeting in Paris of the States General.

[2] The parties to Confederation were the "thirteen original States," namely (in order of signature) Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, and Pennsylvania. Vermont and Maine, which were not admitted as States until 1791 and 1820 respectively, were parties neither to the Articles of Confederation nor to the original adoption of the Constitution.

[3] Article 1. "The Stile of this Confederacy shall be 'the United States of America.'"

under the United States[1]—a provision which, reproduced in the Federal Constitution, was, in the sequel, to play an important part in preventing the establishment of Cabinet government and a responsible ministry.

The ninth clause of the Articles of Confederation reserved to the Congress the exclusive powers of determining on peace and war, of entering into treaties and alliances, of establishing Prize Courts and Courts of Admiralty, of regulating the currency, of regulating trade with the Indians, and of establishing a postal service.

The common expenses, as approved by the Congress, were to be met by contributions made by the States, proportional to the value of the effectively occupied lands within each State, the duty of levying the necessary taxes being left to the several State legislatures.

The States on the other hand were forbidden to maintain vessels of war or standing armies, or to make treaties between themselves, without the consent of Congress; or to tax the property of the United States, or of any other State; and the fourth article provides, in language which has retained its potent force until the present day, that "the free inhabitants of each of these States . . . shall be entitled to all privileges and immunities of free citizens in the several States,"[2] that "full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the Courts and magistrates of every other State[3]"; and that "any person . . . charged with treason, felony, or other high misdemeanour in any State," who "shall flee from justice and be found in any of the United States," shall, on demand, "be delivered up . . . to the State having jurisdiction of his offence."[4]

Finally, somewhat cumbersome provision is made for the establishment, under the authority of the Congress, of *ad hoc*

[1] Cf. Article I, § 6, ii, of the Constitution.
[2] Cf. Article IV, § 2, i, of the Constitution.
[3] Cf. Article IV, § 1, of the Constitution.
[4] Cf. Article IV, § 2, ii, of the Constitution.

Courts of Arbitration to decide disputes between the States "concerning boundary, jurisdiction, or any other cause whatsoever," as also controversies between private persons claiming land under conflicting grants by different States.[1,2]

Here we obviously have before us a rough sketch of a Federal Constitution. And, though General Washington might have hesitated to agree, it may be said that the Confederation sufficiently served its immediate purpose of conducting the Revolutionary War to a successful conclusion. But the bond which it established proved, as might be expected, far too loose to provide an adequate organization for a permanent government. The Articles made no provision for a federal executive or for a federal judiciary; they invested the Congress with no powers of coercion over the States to compel them to pay their allotted shares of taxation, to conform to treaties made in the name of the United States, or to abstain from the exercise of powers reserved to the national government; they gave the Congress no direct jurisdiction over individual citizens. As early as 1781 a committee of the Congress had proposed that power should be given to that body "to distrain the property of a State delinquent in its assigned proportion of men and money."[3] Matters were not improved by the achievement of a victorious peace. In the words of an American historian, "the whole story is one of gradually increasing ineptitude; of a central government which could less and less function as it was supposed to function; of a general system which was creaking in every joint and beginning to hobble at every step."[4]

[1] Six disputes came before the Congress before the Constitution was adopted. In 1782 an Arbitration Court decided, adversely to Connecticut, an acrimonious controversy between that State and Pennsylvania relating to territory which is now in northern Pennsylvania. McLaughlin, p. 130.

[2] The Articles of Confederation contemplate the United States owning property and contracting obligations, and would consequently seem to make them (or it) a Corporation.

[3] McLaughlin, p. 142.

[4] McLaughlin, p. 137.

It is hardly necessary at the present day to emphasize the necessity for the American States to provide themselves with an effective common government; they had great common interests in international commerce, in contemplated expansion westwards, and in possible future wars; two great European powers, Spain and England, were their neighbours on the American Continent; and their total numbers were less than four millions. Nevertheless, so jealous was the attachment of the citizens to their several States, so widespread was the fear of substituting an American King Stork for the British King Log, that to bring about the assembly in Philadelphia, in the summer of 1787, of a Convention commissioned to devise a more authoritative national constitution was, for the gifted and far-seeing men who made it possible, a political achievement of the first order.

The State Constitutions

You already know that what emerged from the Philadelphia Convention was, subject to later amendments, the Constitution of the United States as it exists to-day. But before I proceed to summarize the provisions of that Constitution, I must first ask you to remember that there were already in existence thirteen States. All but two of these[1] had adopted new constitutions in the years which had elapsed since the Declaration of Independence. These instruments were all inspired by the conception that a Constitution derives its force from a source external to the ordinary government, and that in a society of free citizens its authority should be derived from the will of the people at large; and further, that by virtue of this superior authority a Constitution should control and limit the powers of the ordinary legislature. Seven of the States had adopted articles enumerating the indefeasible rights of citizens, enumerations which came to be known as "Bills of Rights."[2]

[1] Save for the repudiation of the authority of the Crown, Rhode Island retained her original charter Constitution until 1842, while Connecticut retained hers until 1818. Both these States had possessed, as Colonies, the right of appointing their own governors. Bryce, 1. p. 431.

[2] McLaughlin, p. 115.

All but two of the State Constitutions provided for a governor and a bicameral legislature.[1] Six definitely asserted the principle which, taught by Montesquieu, had come to be regarded as axiomatic, that the separation and independence of the executive, the legislative, and the judicial powers was essential to free government.[2]

Massachusetts and New Hampshire had provided that money-bills should originate in the lower house of the legislature. Massachusetts had given the governor the power of veto; and all but four of the States had invested him with the pardoning power.[3]

The North-West Ordinance

There is another contemporary document to which I must call your attention, a document of which it has been said that "it is the foundation of almost everything which makes the modern American system peculiar."[4] This was the famous North-West Ordinance, promulgated on 13 July, 1787, by the Congress which was sitting at New York while the Constitutional Convention was sitting at Philadelphia. This ordinance provided for the future government of the vast territory now occupied by the States of Ohio, Indiana, Illinois, Michigan, Wisconsin, and by a part of Minnesota, a territory which had been ceded to the Confederation by Virginia in 1784.

The fundamental policy of that Ordinance is that as the west acquired settlers, it was to be organized into States, politically equal in all respects to the original thirteen, who were by no means to constitute an Atlantic oligarchy dominating a constellation of subject dependencies. But

[1] Pennsylvania and Georgia originally established unicameral legislatures; but Pennsylvania conformed to the fashionable principle in 1790, and Georgia in 1789. McLaughlin, p. 114.

[2] McLaughlin, p. 116.

[3] This was, for the men of that time, by no means a matter of course. At the end of the eighteenth century it was widely held that where the laws represented the popular will, the power of pardon was an abuse.

[4] Article on United States (History) by Alexander Johnston and C. C. Whinnery. *Encyclopædia Britannica*, 13th ed., Vol. xxvii, p. 684.

meanwhile, and until new States were formed, the territory was to be governed by the national Congress, with an appointed Governor, and an elected legislature. "Articles of compact," to be entered into between the original States and the peoples and States of the western territory, were to guarantee the prohibition of slavery, religious freedom, trial by jury, *habeas corpus*, judicial proceedings according to the Common Law, and the right to bail except in capital cases. Cruel and unusual punishments were to be forbidden; no man was to be deprived of liberty or property save by the judgment of his peers or the law of the land; full compensation was to be paid for property taken for the public exigencies; "and in the just preservation of rights and property it is understood and declared that no law ought ever to be made or have force in the said territory that shall in any manner whatever interfere with or affect private contracts or engagements *bona fide* and without fraud previously formed."[1] These provisions are thus imposed by anticipation upon the Constitutions of the future western States.

If we add the history of England, and the works of John Locke and Sir William Blackstone, we shall now have looked at the principal materials which the fifty-five men assembled at Philadelphia may be supposed to have had before their minds.

The Constitution of the United States

We may, then, now make a first survey of the epoch-making instrument which they propounded: and since the institutions they proposed are substantially in force at the present day, I will drop the historic tense.

The United States are governed by a President, a Congress, and a Federal Judiciary.

[1] The Ordinance also contains some interesting provisions relating to the law of inheritance (presumably to be mandatory only until independent States are formed). Estates are to be divided equally, in case of intestacy, among the children of the deceased; grandchildren are to take by representation. No distinction is to be made, in the case of collaterals, between the whole and the half-blood; widows are to be entitled to one-third of the deceased's realty for life, and one-third of his personalty absolutely.

The President

The President is elected for a term of four years: the elections take place in the leap years,[1] and the newly elected President enters upon his office on the 21st of January of the following year.[2] The Constitution sets no limit to the number of times a President may be re-elected; but the example of George Washington, and a widespread sense that there is something unrepublican about prolonged tenure of public office,[3] while permitting a second term, have established a conventional prohibition of a ird.

A recent writer has said that "one of the principal aims of the founders of the American Republic was to make the New World safe against democracy," and that "many of them would have been inexpressibly shocked if they had been told that they were establishing a government of the people, by the people, and for the people."[4] They certainly had no intention of permitting the President to be chosen by anything resembling a general election.[5] The plan they formulated in the second article of the Constitution was based upon election in two stages. In each State there were to be appointed, in whatever manner the different State

[1] But not excluding 1800 and 1900.

[2] Under the 20th Amendment.

[3] The first Constitution of Virginia provided: "That the legislative and executive powers of the State should be separate and distinct from the judiciary; and that the members of the two first may be restrained from oppression, by feeling and participating the burdens of the people, they should, at fixed periods, 'be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all, or any part of the former members, to be again eligible, or ineligible as the laws shall direct.'" Reed, p. 32.

[4] Horwill, 26. "The New Constitution, unless it carried an appeal to the educated and propertied classes, could not have been adopted under conditions as they existed in 1787." "It represented a vigorous reaction against the ultra-democratic idealism which had been embodied in the Declaration of Independence." Munro, p. 87.

[5] Colonel Mason of Virginia remarked in the Philadelphia Convention that it would be "as unnatural to refer the proper character for the chief magistrate to the people as it would be to refer a trial of colours to a blind man"; cited by Munro, p. 88.

legislatures might be pleased to direct, as many electors as the State had representatives in the two houses of Congress. These electors were to assemble in their respective States, and to vote by ballot for two persons, one of whom, at least, should not be an inhabitant of the same State as themselves. It was intended and contemplated that they would exercise a free choice, untrammelled by any party ties or engagements, on the sole ground of their judgment of the personal fitness of the leading men in the country. If, when the votes had been counted, it appeared that some one person had received an absolute majority, he was to be President.[1] But this was not expected to be the normal result of the election; it was anticipated, on the contrary, that the votes would usually be scattered among several, perhaps many, competitors; and in this case the choice of the President was to be made by the lower house of Congress from among the five names standing highest on the poll. It is easy to see that the Founders made no allowance in their calculations for the emergence and dominance of political parties; indeed they regarded such combinations with abhorrence. Washington, in his farewell address, warned his countrymen that "all combinations and associations, under whatever plausible character, with the design to direct, control, counteract, or awe the regular deliberation and action of the constituted authorities, are destructive [of free institutions]." But it was not long before political parties emerged, and asserted what seems to us to be their inevitable domination over any institutions which award political power on the results of free elections. Paper barriers which stood in their path were soon swept away.

And not only did political parties long ago establish their control over all American political institutions; but a parallel and connected movement long since transferred effective influence from those who feared to those who devoutly

[1] I omit reference to the election of the Vice-President. See Article II of the Constitution, as amended by the 12th and the 20th Amendments.

believed in democracy.[1] The original plan for the election of the President has long since been swept into the limbo of unreal things—not by any change in the text of the Fundamental Law, but by the establishment of two peremptory usages: one of which makes it imperative for the State Legislatures to direct that the appointment of the Presidential electors shall be made by popular vote; while the other has transformed the same electors into mere clerks whose sole function it is to vote mechanically for the national party candidate.[2]

The powers of the President are in part general and in part specific. Among his general powers are those derived from the clauses of the Constitution which vest in him the executive power of the United States,[3] constitute him the "Commander-in-Chief of the Army and Navy, and of the militia of the several States when called into the actual service of the United States,"[4] and direct that "he shall take care that the laws be faithfully executed." The President, furthermore, "is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[5]

The Veto Power

Of the specific powers which the Constitution vests in the President it is necessary to mention only three. First, he can veto bills presented to him by Congress, or to speak more accurately, he can refuse to sign a bill, and return it for reconsideration. If this power is not exercised within ten days, the bill becomes law. If after reconsideration, the

[1] "In the history of American democracy we can put up a good argument for the proposition that 1828 [when President Andrew Jackson was elected] is a more significant date than 1776. Munro, p. 91.

[2] Horwill, p. 33. It is now the universal practice for the Presidential electors to be chosen on a "general ticket," that is to say, with the whole of their State for constituency. The result is that a party having a bare majority of the popular vote in a State controls, in respect of that State, a number of votes in the Presidential election equal to the whole number of its representation in Congress. Horwill, p. 34.

[3] Article II, § 1, i.

[4] Article II, § 2, i.

[5] Larkin, *The President's Control of the Tariff*, 1936, p. 42, n. 14.

bill is voted again by a two-thirds majority of both houses, it passes over the President's veto.[1] In early days the use of the veto was very rare, but has become much more common since the Civil War. Down to the end of President Theodore Roosevelt's second term in 1909, the veto had been exercised 541 times; but of these vetoes nearly half were administered by President Cleveland to private pension bills.[2]

Occasionally, with a view to averting an anticipated veto, the Congress will formulate a measure as a rider to an appropriation bill; for the President cannot veto a part of a bill, without vetoing the whole.[3]

The Treaty-Making Power

Secondly, the President, with the advice and consent of a two-thirds majority of the Senate, can make treaties with foreign nations.[4] The question of the extent of the treaty-making power is of considerable interest. In 1920, in the case of Missouri *v.* Holland, what is known as the Migratory Bird Case, the Supreme Court decided that the treaty-making power is wider than the legislative power of Congress, and that consequently a Congressional Statute made in pursuance of a treaty may be constitutional, although, were it not for the treaty, it would be invalid. In the case I have mentioned, the United States had made a treaty with Great Britain for the protection of migratory birds; and the validity of an Act of Congress made in pursuance of the treaty was unsuccessfully contested by the State of Missouri

[1] Article I, § 7. If the Congress, by adjourning, deprives the President of his ten days for reflection, the bill drops.

[2] *Cyclopædia of American Government*, Vol. III, p. 614. More than 2,000 pension bills were sent to President Cleveland (1885–9) for his signature. "On investigation a great proportion of the claims were found to be wholly fraudulent, and the President vetoed as many of these as he had time to examine." J. T. Adams, *History of the American People*, Vol. II, 194.

[3] Two-thirds of the States allow the governor to veto single items in appropriation bills. . . . "This illustrates very well the growing disposition to regard the governor as the guardian of the public welfare against the corrupt schemes of legislators." *Cyclopædia of American Government*, Vol. III, 614.

[4] Article, II, § 2, ii.

on the ground that it invaded the sovereign rights of the State over its wild birds. But though in this respect a treaty is an instrument of higher constitutional rank than a statute, there remains a certain equality between treaties and statutes, so that a treaty can be abrogated by a statute of a later date,[1] and the treaty-making power is not unlimited: a treaty cannot authorize what the Constitution forbids.[2]

The Power of Appointment

The third presidential power which I must mention is the power, with the consent of a majority of the Senate, to appoint ambassadors and other diplomatic officers, justices of the Supreme Court and other superior officers of the United States whose appointment is not otherwise provided for by law.[3]

Delegated Legislative Power

A constitutional problem which recalls one with which we are familiar in this country is presented by the question to what extent the Congress can delegate legislative powers to the President. In view of the constitutional rule of the separation of powers,[4] such a delegation by the legislature to the executive is obviously in principle impossible. On the other hand modern administrative and fiscal legislation calls for much more elaboration in detail than can be worked out by the general legislature.[5] When a police commissioner proclaims a one-way street he makes a minor law.

As a matter of fact, however, the first case in which the Supreme Court held an Act of Congress to be unconstitutional because it had gone beyond the limits of permissible delegation of legislative powers was decided so recently as three years ago. This was the case of The Panama Refining Company *v.* Ryan (1935), known as the "Hot-Oil"

[1] Calvert, Vol. II, p. 43.
[2] Calvert, Vol. II, p. 35. Willis, pp. 432 ff.
[3] See note on the President's removal power at end of this lecture.
[4] And of the specific provision of Article I, § 1, of the Constitution that "all legislative powers herein granted shall be vested in a Congress of the United States."
[5] "Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly": opinion of Hughes, C. J., in Panama Refining Co. *v.* Ryan (1935).

case. "Hot Oil" means contraband or illegal oil. This was also the first case in which President Roosevelt's New Deal legislation fell under the ban of the Supreme Court. In consequence of the discovery of a large new oilfield in East Texas, the production of oil had been immensely expanded, and, as a result, the bottom had fallen out of the market; and the State authorities had found the task of enforcing the State laws regulating output to be beyond their powers. Meanwhile Section 9 of the famous National Industrial Recovery Act had empowered the President to prohibit, under penalties, the transportation in inter-State or foreign commerce of petroleum and petroleum products produced in excess of any State law. In the exercise of this power the President had established a system of Federal control in the oilfield. One of the operators, the Panama Refining Company, petitioned for an injunction against the Federal officers; and the Supreme Court decided in their favour, on the ground that the powers given to the President, under which they acted, were legislative, and therefore unconstitutional. They were legislative because they were too general; and they were too general because, in giving the President a discretion, Congress had failed to indicate the policy in the light of which the discretion was to be exercised. The Act said nothing about the circumstances in which the transportation of oil should be forbidden. It did not require the President to ascertain and to proclaim the conditions prevailing in the industry which made the prohibition necessary.

Shortly after this decision Congress passed a further Act to meet the criticisms of the Supreme Court. This Act dealt exclusively with contraband oil, defining it as oil produced in excess of the amount permitted by the State laws: proclaimed a general prohibition of the transportation of such oil in inter-State commerce; and provided that this general prohibition should be suspended if the President should proclaim his finding of fact that it had resulted in an undue restriction on inter-State commerce in oil, in view of the legitimate demand. This act was upheld by the Supreme

Court. But it is interesting to note that the statute had provided in express terms that if any provision of the section authorizing the President to suspend the general prohibition should be held to be invalid, the general prohibition should remain in full force.

The Congress

I turn now to the organization of Congress. One of the most knotty problems which the authors of the Constitution had to solve was how to arrange the representation of the people in the Congress in such a way as to give due weight to the claims of numbers without swamping the smaller States. Virginia, for example, had nearly twelve times the population of Delaware; Pennsylvania had five times the population of Georgia. The solution finally adopted based representation in the lower house, the House of Representatives, on numbers, while in the Senate all the States, large and small, were equally represented by two Senators apiece. This compromise remains in force to-day; with the result that Nevada, with a population of 100,000, has two Senators and one representative in the lower house; while New York State, with a population of nearly thirteen millions, has also two Senators, but in revenge has forty-five members in the House of Representatives.

When the first Congress met, there were thirteen States, and the Senate was composed of twenty-six members; now that there are forty-eight States, it has ninety-six members. This fact alone must have made a considerable change in its character as a deliberative assembly; for twenty-six people can sit round a table, while ninety-six fill a hall.

The Senate is a semi-permanent body, each member being elected for a term of six years, one-third of them vacating their seats every two years, But they can be, and, subject to the vicissitudes of politics, they often are re-elected again and again. A Senator with a loyal constituency is the most permanently conspicuous figure in American public life; and after the Presidents and the Secretaries of State, the Senators are the men whose names most often survive a Transatlantic passage.

The House of Representatives, which is composed of 435 members, is elected as a body for two years only. The biennial elections take place alternately in the year of the Presidential election, and half-way through the President's term; a fact which gives the President a convenient opportunity for guessing what the public think of his policies before it is too late.

As regards the suffrage for the House of Representatives, the Constitution provides that it shall be the same in each State as that prescribed by the State law for the most numerous branch of the State legislature.[1] In early days the States as a rule required a property qualification; but the newer States in the West never did so; and by 1860 the trend to democracy had everywhere established a system of white male suffrage.[2]

By the 19th Amendment, which was ratified in 1920, it was provided that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." When this amendment was adopted full suffrage was already enjoyed by the women of fifteen States, and the right to vote in the Presidential election by those of twelve more.[3]

You will notice that the amendment applies not only to Federal but also to State elections. Like the famous 15th Amendment, which in 1870 prohibited electoral discrimination against negroes, it is of constitutional interest by reason of the fact that it restricts the power of the States to regulate their own domestic suffrage. But it only prohibits discrimination on the ground of sex; it confers no right to vote. Consequently it leaves the States at liberty to raise the voting age, or to impose such residential, education, or property qualifications as they may think fit, provided such conditions apply equally to men and to women.

As regards the Senate, the Constitution originally provided that the Senators should be chosen by the legislatures

[1] Article I, § 2, i.
[2] Reed, p. 102.
[3] Magruder and Claire, *The Constitution*, p. 351.

of their respective States.[1] But here again democracy has had its way; and by the seventeenth amendment, which was adopted in 1913, it was provided that senators should be elected by direct popular vote, the electorate being the same as that which elects the members of the lower house.

Residential Qualification

Of the many differences between the law and the political traditions which govern the representation of the people in America and in England, none is more important than the incomparably greater emphasis laid in America as compared with this country upon local residence as a qualification for elected office. With us you may fairly say that a candidate for parliament is in no way handicapped by the fact that he comes from a different part of the country or from some other part of the British Empire. In America it is far otherwise.[2] The Constitution itself requires that every member of Congress, whether of the Senate or of the House, shall, when elected, be an inhabitant of the State for which he is chosen.[3] But in the case of the House of Representatives, a peremptory and nation-wide custom goes much further and imposes upon every candidate the well-nigh indefeasible rule that he must be a resident in the electoral district which he seeks to represent.

This principle, which to us appears so strange and inconvenient,[4] is said to be a survival of the intense regionalism of Colonial days and seems to most Americans to be

[1] Article I, § 3, i.

[2] This remark is perhaps somewhat less true of Scotland, Wales and Northern Ireland than it is of England. For a discussion of the subject see Bryce, Chap. xix; Horwill, Chap. ix and Lowell, *Government of England*, II, 5 v.

[3] Article I, § 2, ii and § 3, iii.

[4] But it is not perhaps generally known that at one time it was necessary for a member of the House of Commons to be a resident of the county or borough which he represented. The requirement was imposed by an act of Henry V's reign. It began to lapse in Tudor times, when the statute was evaded by the admission of strangers to free burgess-ship. It was formally repealed in 1774. Horwill, p. 169.

obviously reasonable.[1] But it has the inevitable consequence of excluding from election to the House of Representatives everyone who lives in a district in which his party is in a permanent minority, as well as most people who live in a district which, though professing congenial politics, is rich in competitive talent.

Limitations on Legislative Powers

The legislative powers of the Congress are not, like those of the British Parliament, unlimited. On the contrary, they are restricted by language the interpretation of which forms one of the main topics of American constitutional law, and of these lectures.

The principles which inspired these limitations were two in number; the first was the principle that the new Federal Government was called into existence for the limited purpose of providing for those concerns and interests which the States had in common, and that, save to this necessary extent, the sovereignty of the several States was not to be impaired; while the second principle was the idea which, as I said a few minutes ago, had already found expression in the State constitutions, namely that certain fundamental axioms might be placed by the Constitution beyond the reach of the ordinary legislature. In other words, the limitations placed upon the powers of Congress have the twofold object of protecting the sovereignty of the States, and of protecting the rights of the individual citizen. And perhaps I ought to add that the very term "limitation" as applied to the powers of Congress in particular, and to those of the Federal Government in general, conveys imperfectly the spirit of the Constitution. The National Government is not, in theory, an institution which is invested *prima facie* with a comprehensive political sovereignty, but to which certain limitations have been applied; it has possessed, from the outset, only a delegated authority. It is to be compared not to an infant, an alien,

[1] Horwill, p. 174. "The practice is unknown . . . in Canada or Australia or any other part of the British Dominions overseas." ibid.

or a married woman, but to an agent. On the other hand, the delegation of powers to the National Federal Government is to be regarded not as a concession made by the several States, but as coming from the people of the United States at large. That is to say, that the sovereignty of the United States and the sovereignties of the individual States are derived independently from the same source. And if it be true that the line of demarcation between the sovereignty of the Federal Government and that of the forty-eight States is to be regarded as so traced that whatever powers the Constitution has not given, either expressly or by implication, to the Union, are reserved to the States,[1] that is not because the States have any primacy over the Union, but because the common creator of both, the people, has so willed it.

Let me add that an Englishman speaks with all the greater diffidence of these high doctrines of American constitutional metaphysics by reason of the fact that they have, from the foundation of the Union to the present day, formed the subject of unceasing controversy in America, and have given occasion to an immense literature, to countless debates, to innumerable judicial decisions, and to a great civil war.

The boundary between the legislative powers of Congress and those of the States, is traced by the Constitution in three sets of provisions; those which say what the Congress can do; those which say what the Congress cannot do; and those which say what the States cannot do.

But before I summarize these provisions I must say a word or two about the amendment of the Constitution. The 5th article of the Constitution provides for its amendment as follows. Amendments may be proposed in either of two ways; either by a two-thirds vote of both houses of Congress; or by a convention called together on the application of the legislatures of two-thirds of the States; and an amendment proposed in one or other of these ways

[1] 10th Amendment.

becomes a part of the Constitution when ratified by the legislatures of, or by conventions in, three-fourths of the States.[1] Up to the present time twenty-one amendments have been adopted. Of these the first ten, and the fourteenth, are of particular interest for our present purposes, since they form a most important supplement to the limitations imposed by the original text of the Constitution upon the powers of Congress and of the States respectively.

I go back then to the three sets of provisions of which I spoke a moment ago.

The 8th Section of the 1st article of the Constitution enumerates the powers of Congress. It is too long to read through; and I shall therefore confine myself to reading a few of the more salient sub-sections.

By this section Congress is given power to lay and collect taxes, duties, imports and excises, to pay the debts and provide for the common defence and general welfare of the United States; to borrow money on the credit of the United States; to declare war; to raise and support armies and to maintain a navy; to regulate commerce with foreign nations and among the several States; to coin money and to regulate the value thereof; to establish a uniform rule of naturalization; "to make all needful rules and regulations respecting the territory or other property belonging to the United States";[2] to legislate for the national capital and the small district in which it is situated,[3] that is to say, for the city of Washington and the District of Columbia in which it

[1] The Amendment Article (the 5th) provides that no amendment shall avail to deprive any State, without its consent, of "its equal suffrage in the Senate." It would be a nice question of Constitutional law whether an amendment would be invalid which confined itself, in terms, to amending this article in general terms, without preserving the provision just cited.

[2] This provision is found not in the 8th Section of Article I, but in the 3rd Section of Article IV.

[3] "And to exercise like authority over all places purchased by consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." Article I, § 8.

stands; and generally "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

The following section[1] of the first article gives a first enumeration of the things which the Congress (and *a fortiori* the President) may not do. It is enough to mention the following; the Congress may not suspend the privilege of the writ of *habeas corpus*, "unless when in cases of rebellion or invasion the public safety may require it"; it may pass no bill of attainder or *ex post facto* law; it may impose no direct tax except in proportion to the population of the several States—a prohibition which was in effect repealed in 1913 by the 16th Amendment, which authorized a national income tax: and the Congress may give no preference "by any regulation of commerce or revenue to the ports of one State over those of another."

These were the principal restrictions imposed by the Constitution, in its original form, upon the powers of Congress. But to many of the most influential members of the State Conventions to which the draft was submitted for ratification, these restrictions appeared to furnish most inadequate protection against the possible tyranny of the new government.[2] This feeling was particularly strong in the three key States of Massachusetts, New York, and Virginia. Finally, however, after prolonged and arduous debates, the Constitution was ratified in these States on the understanding that it should be one of the first duties of the new Congress to promote the adoption of further guarantees in the form of a "bill of rights." Effect was duly given to this understanding in the form of the first ten amendments, which came into force on 15 December, 1791.

The principal provisions of these amendments prohibit the establishment of a State church, and guarantee religious

[1] Article I, § 9.

[2] Cf., McLaughlin, Chap. xv. The absence of a "bill of rights" was of course by no means the only defect relied on by the critics of the Constitution.

toleration, the rights of free speech, freedom of the press, freedom of assembly, and petition; prohibit unreasonable searches and general warrants; require serious crime to be tried on indictment found by a grand jury; forbid any person to be subject for the same offence to be twice put in jeopardy of life or limb; to be compelled in any criminal case to be a witness against himself, or to be deprived of life, liberty, or property without due process of law. We have met with this phrase before; and we shall meet with it again. The 6th and 7th Amendments respectively guarantee trial by jury in criminal prosecutions and in civil suits at Common Law: for the Constitution recognizes the distinction between Common Law and Equity.

Before I leave these amendments, which I have so briefly summarized, I must emphasize the fact that they apply only to the Federal Government, and have no application to the States. It is true that similar provisions are often, if not commonly, to be found in the Constitutions of the States; but if a State has retained the liberty, under its own Constitution, to deviate from the principles laid down in the Federal Bill of Rights, it cannot be called to order by a Federal Court.

I may illustrate this by the case of Maxwell *v.* Dow decided by the Supreme Court in 1900. Maxwell had been tried and convicted in a Utah State Court on a charge of robbery. In accordance with the law of the State he had been prosecuted by information, that is to say, without a previous finding by a grand jury as required by the 5th Amendment, and he had been tried by a jury of eight, that is to say by a number less than the twelve required by the Common Law and therefore by the 6th Amendment. The Supreme Court of the United States held, on a writ of error, that the State Legislature was not controlled by the amendments in question and that Maxwell had been properly and lawfully convicted.[1]

[1] The substantial issue discussed in this case was not whether the 5th and 6th Amendments originally governed the State Legis-

I turn now for a moment to the provisions in the Constitution expressly limiting the powers of the States. These are to be found in the 10th Section of the 1st Article, and are, briefly, to the following effect. No State may enter into any treaty, alliance, or confederation; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debt; or pass any bill of attainder, *ex post facto* law, or any law impairing the obligation of contracts—this last restriction having proved, in the sequel, as we shall see, to be of great practical importance.

Then there are certain things which the States may only do with the consent of Congress. Without such consent States are forbidden to levy duties on imports or exports "except what may be absolutely necessary for executing its inspection laws"; to enter into any agreements or compacts with other States or with foreign powers;[1] or to engage in war unless actually invaded "or in such imminent danger as will not admit of delay."

This short list of the things which the States may not do has been extended by four of the subsequent amendments:

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latures, a question as to which there was no doubt, but whether the sphere of application of those amendments had been extended to State legislation by the 14th Amendment. The "leading case" on the inapplicability of the first ten Amendments to State legislation is Barron v. Baltimore (1833). In the course of his judgment in this case, Chief Justice Marshall said: "It is universally understood . . . that the great revolution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union. . . . might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of local governments."

[1] A recent example of the confirmation by Congress of an inter-State agreement is furnished by the Joint Resolution of 10 August, 1937, approving a compact between the States of Oklahoma, Texas, Kansas, New Mexico, Illinois and Colorado, all oil-producing States, for the prevention by suitable legislation of the waste of oil and natural gas.

by the 13th, which abolished slavery, by the 15th, which prohibited denial of the franchise on account of "race, colour, or previous condition of servitude," by the 19th, the Women's Suffrage Amendment, and more particularly by the first section of the 14th Amendment, which contains the following supremely important provision: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

For nearly two generations past these words—Privileges, Immunities, Due Process of Law, and Equal Protection of the Laws—have formed a central battleground in American Constitutional Law.

But substantial and important as are the restrictions imposed by the Constitution (with its amendments) upon the sovereignty of the States, it remains nevertheless true, and it is important to remember, that the major share in all the business of legislation and of law enforcement in America devolves not upon the Federal Government, but upon that of the States.

The whole law of real and personal property, the law of contract and of tort, commercial law, the law of trusts, family law, the greater part of administrative law relating to such subjects as labour conditions, factory acts, child labour, public health, public morals, education, the law relating to the organization, power and procedure of the Courts, the whole of the criminal law, save where it rests upon federal legislation directed to the limited class of federal purposes; all these subjects are reserved to the States, except only in the comparatively rare, though constitutionally important cases where an exceptional prerogative is vested in Congress or the Federal judiciary.

One of the great questions of the present day is whether the field of legislation reserved to the States and denied

to Congress is not so wide as to render intractable certain problems, the satisfactory solution of which would seem to require uniform laws throughout the country.[1] Among these problems, perhaps the most notable are those presented by conditions of labour, commercial law, and marriage and divorce.[1]

Relations Between Legislature and Executive

And now I must change the subject once more, in order to clear the decks for my principal theme, which will be the Federal judicial power. I must not leave the subject of Congress far behind, before I call your attention to the marked contrast between the relations which exist between the legislative and the executive powers in America and in England respectively. Walter Bagehot has said that "the efficient secret of the English Constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers."[2] This union is brought about, as we all know, by the machinery of Cabinet government. The Cabinet exercises the constitutional prerogatives of the Crown, administers the laws, spends the taxes and conducts the foreign policy of the nation. In the discharge of these duties it is subject to the control of Parliament, without whose consent and approval the Ministry could not retain office. But on the other hand Parliament is itself controlled by the Cabinet. It is the Cabinet which, in effect, decides how Parliament shall spend its time, what bills it shall discuss and pass into law, what taxes it shall vote and to what objects their proceeds shall be appropriated.

No legislation involving the expenditure of money or the imposition of a tax can be even initiated except on the proposition of a minister. In the exercise of the prerogative of the Crown the Cabinet can dissolve Parliament. In short the Cabinet is the Government; and being the Government it is its business to manage Parliament, and if it cannot

[1] Willis, p. 249. Professor Willis is of opinion that the "dual form of government" is in process of disintegration.

[2] *The English Constitution*, 1878 edition, p. 10.

manage Parliament it must make way for the people who can. There are two reasons why such a system is possible; one is that by hypothesis the Cabinet can rely upon a parliamentary majority, and the other is that it is itself a parliamentary body; and that of necessity it includes among its members the leaders of the dominant political party in the country and in Parliament.[1]

I have rehearsed these familiar propositions in order to say that not one of them is true of America.[2] Whereas the English system is based upon a complex union of the legislative and the executive powers of government, the American system is based upon the opposite principle, their separation. The chief political experience of the Founders was acquired in a Revolution, and it is therefore not surprising that they were more concerned to make tyranny difficult than to make policy easy. So we find that the President does not, like our Prime Minister, derive his authority from his influence with the legislature, but from an independent popular election. He and the Congress may be in opposition to each other; but, though this may be inconvenient to both, it does not involve either the resignation of the President or the dissolution of the Congress.

If the President belongs to the same party as the majority of the Congress, and has the necessary personality, he may exercise a considerable, even a commanding, influence. But his influence is necessarily indirect, and uncertain. Neither he, nor any of his principal officers, are members of

[1] Until a few years ago it was commonly thought that party organizations were peculiarly characteristic of popular governments. Recent experience has shown that they are at least equally necessary to dictatorships. Both the first and the third Napoleon would perhaps have retained their thrones if they had anticipated this discovery.

[2] "In Government the American people have purposely deprived themselves of responsible leadership and consequently have not developed an effective mechanism of control over leadership." "Popular Control of Government," F. A. Cleveland, 34, *Political Science Quarterly*, p. 236 (1919).

the legislature or have any direct means of controlling or managing its proceedings. It is true that there is a Cabinet, though it is not mentioned in the Constitution:[1] it is composed of the administrative heads of the great departments of State. But its members have no political responsibility, distinct from that of the President. They are seldom chosen from among the politically prominent members of the President's party, or from among the leading members of Congress; they are never called Ministers. In short, they are rather to be regarded as the President's staff officers than as his subordinate generals.

Nowhere is the divorce between the President and the legislature more notably to be seen than in the field of finance. In England the Chancellor of the Exchequer, the senior member of the Cabinet after the Prime Minister, is exclusively responsible for initiating all financial measures —both those authorizing the imposition of taxation, and those authorizing expenditure; he is a member of the House of Commons, in which, in his Budget speech, he annually states his plans for the ensuing year, and in which, for weeks and months on end, in Committee of the whole house, he explains and defends his proposals.

The role of the House of Commons is confined to criticism and the vindication of publicity. There is no unofficial member of Parliament, no chairman of a Committee, to share with the Finance Minister the complex responsibility of the national financial administration, of propounding the scheme of public expenditure, and of securing that the money provided by taxation shall be neither too little nor too much to meet the bill. In the United States, on the contrary, there is no public officer who at all closely corresponds to the Chancellor of the Exchequer. The Secretary of the Treasury is a member of the Cabinet, but he is not a member of Con-

[1] The nearest approach to a reference to a Cabinet is the provision in Article II, § 2, i, that the President may "require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices."

gress. He can and does furnish information to Congress, make suggestions concerning taxation and expenditure, and keep the national accounts; but he is not the responsible author of a Finance Act, and he takes no part in public debates. The power and the responsibility in matters of finance are in the hands of several unofficial persons, the Chairmen of the principal committees of the House of Representatives and of the Senate, and it may perfectly well happen, and has in fact happened, that both expenditure and taxes are voted of which the President and the Secretary of the Treasury disapprove. The machinery of government is not designed to make it easy to preserve a meticulous balance between the two heads of account, receipts and expenditure.[1] The acknowledged defects of the system were until recent years obscured by the large and regular surplus brought in by the highly protective tariff.

In short, the Constitution is dominated throughout by the principle of "checks and balances." The States and the National Government were from the beginning intended to hold each other in check; the Congress and the President were to be balanced against each other and both were to be checked by the Federal judiciary. We must bear this fundamental idea in mind when we come to study the subject, of which so much has been heard in recent years, of the obstacles put by the Supreme Court in the way of Congressional legislation. We must not forget that it was a governing purpose of the Constitution to prevent either the legislature alone, or the legislature and the President in association, from having a free hand. And the same prin-

[1] On the subject generally, cf. Woodrow Wilson, *Congressional Government*, 1925, Chap. iii. See also *The Financial Systems of the United Kingdom and the United States of America*, T. E. Naughton, *Public Administration*, 1930, p. 283. An Act of 1921, providing for a national Budget system, places upon the President the duty of transmitting to the Congress an annual Budget, together with his estimates of receipts and expenditures, and other relevant data, and creates, for the assistance of the President, a Bureau of the Budget. But if the President proposes, Congress still disposes—and can propose as well.

ciple has found expression in the Constitutions of all the States.

Note on The President's Removal Power

The important question was long a matter of controversy whether or no the President has the power to dismiss, without the consent of the Senate, officials for whose appointment that consent is necessary. Of course this question does not arise in regard to the Federal judges, who, by the terms of the Constitution, hold their offices during good behaviour—which means that they can be removed only by impeachment. But as regards Federal officials other than the judges the question long remained undecided whether an Act of Congress could validly deprive the President of the power of removal. The question has twice in recent years been considered by the Supreme Court. In 1920, President Wilson directed the dismissal from office of one Myers, the postmaster of Portland, Oregon: and in so doing contravened an Act of 1876 which had provided that postmasters should be removable only with the consent of the Senate. The question of the legality of the President's action came before the Supreme Court in 1926, in the case of Myers *v.* the United States,[1] with the result that the Act of Congress was declared to be unconstitutional, and the validity of Myers' dismissal was affirmed. In the language of Chief Justice Taft "a veto by the Senate upon removals is a much greater limitation upon the executive branch and a much more serious blending of the legislative with the executive [power] than a rejection of a proposed appointment."

This decision was regretted by many people in America, not by reason of any deep concern for postmasters, who are

[1] It is interesting to record that in this case, so soon as it appeared that a prerogative of the Senate was called in question, the Chief Justice invited Senator Pepper of Pennsylvania to assist the Court as *amicus curiae* by presenting an argument in support of the claims of the Senate.

the chief beneficiaries of the political spoils system, and who in any case are appointed for four years only, but because it called in question the validity of a number of statutes by which Congress has sought, very judiciously, to put certain offices as far as possible outside party politics, by making their tenure secure. Such are the office of Comptroller General, and membership of the Interstate Commerce Commission, the Tariff Commission, the Federal Trade Commission, the Federal Reserve Board, and others.[1]

The effect of the Myers case was, however, greatly limited, and the views of the critics were presumably satisfied, by the later decision of the Supreme Court (in 1935) of the case of Rathbun *v.* U.S. In this case the person who had been dismissed, a Mr. Humphrey, had been a member of the Federal Trade Commission, appointed by President Hoover, with the consent of the Senate, for a term of seven years. When only two years of this term had elapsed President Roosevelt removed Humphrey on the express ground that he was not in sympathy with the President's policies.[2] Humphrey having died in 1934, his executor, Rathbun, brought suit for his arrears of unpaid salary before the Court of Claims, and the case came on appeal before the Supreme Court. A Federal Act[3] provided, in effect, that a member of the Federal Trade Commission should be removable only for inefficiency, neglect of duty, or malfeasance in office. The Court held that this Act was

[1] Cf., "The Consequences of the President's Unlimited Power of Removal," H. L. McBain, 41, *Political Science Quarterly*, p. 596 (1926).

[2] On 31 August, 1933, the President wrote to Mr. Humphrey; "You will, I know, realize that your mind and my mind do not go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence."

[3] The Federal Trade Commission Act, 1914. This Act creates a Commission of five members, and contains the extremely interesting provision that "Not more than three of the Commissioners shall be members of the same political party." The Act did not expressly provide, but was interpreted by the Court to mean, that a Commissioner should be removable *only* for the reasons stated.

constitutional, and that Humphrey's removal was illegal. The Myers case was distinguished on the ground that a postmaster is a purely executive officer, whereas a Federal Trade Commissioner has duties which are in certain respects quasi-legislative and in others quasi-judicial in character. The extent to which Congress can limit the President's removal power depends upon the character of the office concerned.

LECTURE II

THE FEDERAL JUDICIARY

I COME now to the Federal Judiciary.

The Constitution provides[1] that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior Courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office."

Notice that the Constitution lays down for the Federal Judiciary two principles from which the States have, in general, long departed; one is that the judges shall be appointed and not elected; and the other is that they shall hold office not for a term of years, but, provided they are of good behaviour, for life.

The provision which I have just read leaves a wide field of judicial organization to be regulated by Congressional legislation. It leaves to Congress the decision as to the number and emoluments of the Supreme Court Justices, as to the numbers and organization of the inferior Courts, and as to the system of appeals. As the law stands at present, the Supreme Court is composed of a Chief Justice and eight associate justices. The Federal Courts subordinate to the Supreme Court consist of ten circuit courts of appeal and of forty-eight district courts, corresponding to the forty-eight States. The tendency of modern legislation has been to relieve the pressure upon the Supreme Court by

[1] Article III, § 1.

confining its appellate jurisdiction, so far as the Constitution permits, to cases involving constitutional questions.[1]

The Courts established by Congress in pursuance of the clause in the Constitution which I have quoted are sometimes spoken of as the "Constitutional Courts" in contradistinction to the "Legislative Courts," established by Congress under certain other clauses of the Constitution. The "Legislative Courts" include, for example, the Courts of the District of Columbia, established under the provision[2] which gives to Congress the exclusive power to legislate "in all cases whatsoever over such district . . . as may . . . become the seat of the Government of the United States."

The "Legislative Courts" also include the Courts in the territories, established under the clause[3] which gives power to Congress "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." The territories, of which there now remain only two, Hawaii and Alaska, are countries which have been incorporated in the Union, but have not yet been endowed with the privileges of statehood. In the words of Chief Justice Marshall,[4] speaking of the Courts in what was at that time the Territory of Florida, "these Courts . . . are not Constitutional Courts, in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are Legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables the Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of the judicial power which is defined in the Third Article of the Consti-

[1] The Judicial Code, particularly Sections 344 to 347; *The Business of the Supreme Court* (1928), Frankfurter and Landis.
[2] Article I, § 8, xvii. [3] Article IV, § 3, ii.
[4] The American Insurance Co. *v.* Canter (1828).

tution. . . ."[1] In such Courts the judges may hold office for a limited time, or during pleasure; and may be required to perform duties, such as that of giving advisory opinions, which cannot be imposed upon the Constitutional Courts.[2]

The jurisdiction of the Federal Courts may be divided into three heads. The first of these is a jurisdiction which is independent of the existence of the States. The other two presuppose and arise from the existence of the States.

The first head embraces civil and criminal causes founded on Federal law alone; such, for example, as proceedings in admiralty, since admiralty jurisdiction is exclusively federal; or an action under a Federal Act, for damages for the death of an employee in inter-State commerce; or a prosecution for an offence under the Post Office Acts. This head of jurisdiction also includes all proceedings in the "Legislative Courts."

The second head of Federal jurisdiction is that which arises from the duty cast upon the Federal Courts of defending the Federal Constitution and the Federal laws, against possible trespasses by the State Courts; or, to speak more accurately, of adjudicating in the last resort in cases in which a claim resting upon the Federal Constitution, or a Federal Statute, or a Treaty, has been called in question in a State Court, and has there been either improperly denied, or improperly allowed.[3] It is by this jurisdiction, and by this jurisdiction almost exclusively, that the Federal Government exercises any control over the States. We shall meet with many examples of it.

The third head of Federal jurisdiction does not depend, as do the other two, upon the subject-matter of the litigation, but upon the character of the parties. The Constitution[4] provides for several cases of jurisdiction of this kind; of

[1] Other examples of "Legislative Courts" are the Court of Customs Appeals and the Court of Claims, which has jurisdiction of claims against the United States, corresponding to our proceedings by Petition of Right.

[2] Van Devanter, J., in *ex parte* Bakelite Corporation (1929).

[3] Judicial Code, § 344.

[4] Article III, § 2.

which it will be enough for me to mention four. The Federal Courts have jurisdiction in all cases affecting Ambassadors, other public Ministers, and Consuls; in all cases in which the United States is a party; in all litigation between two or more States; and in all cases arising between citizens of two or more States.

The jurisdiction which is founded upon the fact that both plaintiff and defendant are States of the Union is an impressive one, and has been not infrequently exercised. Up to the year 1919 there had been about 70 cases of this kind.[1] The majority of these controversies had been boundary disputes. A whole series arose from the claim of Virginia against West Virginia for a contribution to the public debt of the former State—West Virginia having been separated from Virginia during the Civil War. There was little doubt as to the liability of the defendant State, but the legislation dragged on for many years. Finally, in 1918, the Supreme Court was on the verge of resorting to measures of coercion; but in 1919 West Virginia surrendered and the State legislature passed an Act providing for payment of the debt.[2]

An interesting example of this jurisdiction is to be found in a case which came before the Supreme Court in 1907, in which the State of Kansas filed a bill in equity against the State of Colorado,[3] praying for an injunction to restrain Colorado from constructing or operating any canal, ditch or reservoir whereby the waters of the Arkansas river should be diverted for purposes of irrigation. I may explain that the Arkansas river rises in Colorado and flows through the States of Kansas and Oklahoma, and the State of Arkansas, where it reaches the Mississippi. The complaint of the State of Kansas was to the effect that owing to the extensive use of the water in the upper part of the river for the pur-

[1] James Brown Scott, *Judicial Settlement of Controversies Between States of the American Union.* 1919 (Oxford).
[2] Frankfurter and Katz, *Cases on Federal Jurisdiction*, p. 730.
[3] Kansas *v.* Colorado (1907).

poses of irrigation, the quantity of water available for similar purposes in Kansas was unduly diminished. The Court found as a fact that while it was true that the flow of water available in Kansas had been diminished by the action of Colorado, the diminution was not sufficiently great to justify the issue of an injunction, and it consequently dismissed the petition.[1, 2]

The jurisdiction *ratione personæ* resting upon what is known as the "diversity of citizenship" clause has proved one of the most fertile (or burdensome) sources of business coming to the Federal Courts. Its extent was greatly amplified when it was decided, nearly a hundred years ago, that for the purposes of the jurisdiction founded upon diversity of citizenship, a company or corporation was to be deemed to be a citizen of the State by which it was chartered.[3] It has not been uncommon for companies to get themselves incorporated in a different State from that in which they intend to do business, in order to benefit by the right given by diversity of citizenship to litigate in the Federal Court.

I will illustrate this practice by a case which is interesting on other grounds.[4] In 1925 the Louisville and Nashville Railroad Company, a Kentucky Corporation, made a contract with the Brown and Yellow Taxi Company, a Tennessee Corporation, whereby the railroad company granted to the taxi company the exclusive privilege of going upon its trains, into its stations, and on the surrounding premises, to solicit transportation of baggage and passengers. In spite of this agreement the railroad company permitted a rival taxi company, the Black and White Taxi Company, to invade the monopoly granted to the Brown

[1] The United States intervened in this action, claiming the power to legislate for the reclamation of all arid lands. This claim the Court rejected.

[2] So recently as 1935 the Supreme Court entertained and decided, in the case of the State of Wisconsin *v.* State of Michigan, a boundary dispute between these two States.

[3] Louisville, Cincinnati and Charleston Railroad Co. *v.* Letson (1844); and cf. Covington Drawbridge Co. *v.* Shepheard (1858).

[4] Black & White Taxi Co. *v.* Brown & Yellow Taxi Co. (1928).

and Yellow Company, and to solicit business in the station and on the trains of the railroad company as though no exclusive privilege had already been contracted for. The Brown and Yellow Company brought suit in the Federal District Court, relying on the diversity of citizenship clause; and the case ultimately reached the Supreme Court of the United States, on appeal by the interlopers.[1] It was an established fact that the Brown and Yellow Company, the monopolists, had originally been a Kentucky Corporation, and that they had dissolved and reconstituted themselves in Tennessee with the sole purpose of creating a diversity of citizenship, for the reason that the Kentucky Courts had several times held monopoly contracts of the kind in question invalid, whereas the Supreme Court of the United States had more than once decided in the opposite sense. In the present case the Supreme Court held, by a majority, that it could not inquire into the motives which had actuated the Brown and Yellow Company in acquiring citizenship in Tennessee; and, on the merits, that the question before the Court was a pure question of Common Law, and that, inclined as are the Federal Courts to follow the decisions, on matters of general law, of the Courts of the State in which a controversy had arisen, they nevertheless remained free to exercise their own independent judgment, and in this case they held the anti-monopolist doctrine of the Kentucky Courts to be heretical. So the Brown and Yellow Company got the full benefit of their emigration to Tennessee.

The Federal Courts, in common with the State Courts, have the duty, when the case before them requires it, of applying the Constitution of the United States. In the language of the 6th Article: "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." This exalted authority to give ultimate effect to

[1] ***Strictissime***, by *certiorari* on the petition of the interlopers.

the Constitution as the "supreme law of the land" is vested in a pre-eminent degree in the Supreme Court, which has jurisdiction to adjudicate in the last resort in all cases in which the interpretation and application of the Constitution is at issue, whether originating in an inferior Federal Court or in a State Court. I shall, therefore, in what I have to say about the judicial interpretation of the Constitution speak in general only of the Supreme Court. Though you must understand that in theory, at any rate, every Court in the land, whether Federal or State, has the same jurisdiction and duty of applying the Constitution as the supreme law of the land. And since the Constitution is a law of superior authority to any other, the Supreme Court is confronted from time to time—very rarely in the early days, very frequently in modern times—with the question whether a law of lower authority—an Act of Congress, a State Statute, or even a State Constitution—conforms to or conflicts with the provisions of the Constitution. If, in the opinion of a majority of the Court, the incriminated law is guilty, if it has been demonstrated, to the satisfaction of the judges, that it transcends the powers of the legislature, or offends against a Constitutional prohibition, in other words if it is *ultra vires*, the Court decides accordingly, gives the preference to the higher law of the Constitution, and rules that the inferior law, being unconstitutional, is a law only in appearance, and that in fact it is no law, but a nullity. Mr. Justice Day, speaking for the Court, in the case of Muskrat *v.* the United States (1911) explained the practice in the following words: "The right to declare a law unconstitutional arises because an Act of Congress relied upon by one or the other of [the] parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this Court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the Court to choose between the fundamental law and a law purporting

to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the government."

Mr. Justice Story, nearly a hundred years ago, stated the principle upon which the Court acts in the following language: "As the Constitution is the supreme law of the land, in a conflict between that and the laws, either of Congress or of the States, it becomes the duty of the judiciary to follow that only which is of paramount obligation. This results from the very theory of a republican constitution of government; for otherwise the acts of the legislature and executive would in effect become supreme and uncontrollable, notwithstanding any prohibitions or limitations contained in the Constitution; and usurpations of the most unequivocal and dangerous character might be assumed without any remedy within reach of the citizens. The people would thus be at the mercy of their rulers in the State and National Governments; and an omnipotence would practically exist, like that claimed for the British Parliament."[1] Story here speaks of the judicial control of the legislature as an essential feature of a republican constitution. He would have been more accurate if he had said that it was an essential feature of a constitution which imposes express restrictions upon the powers of the legislature; and this is more particularly evident in the case of a federal constitution, where the restrictions are directed in large part to the preservation of the relative independence of the National Government and the States, and of the States *inter se*. For the working of such a constitution an authoritative arbitrator is essential.

You must not, however, suppose that the claim of the Supreme Court to adjudicate in the last resort upon the validity of Federal Statutes and the Acts of the State legislatures has always been acquiesced in without protest. In the early days the protagonists of State rights particularly resented the invalidation by the Supreme Court of Statutes

[1] Story. *Commentaries on the Constitution.* § 1,576.

of the States, and the controversy reached the height of an almost personal conflict between Chief Justice Marshall and Thomas Jefferson. It was contended by Jefferson's party, the Anti-Federalist or Democratic party, that Marshall, in asserting the censorial prerogative of the Court, had been guilty of a usurpation; and that the founders of the Constitution never contemplated the exercise by the Court of the power which it had assumed. Jefferson's view as to the right construction of the Constitution was that "each department is truly independent of the others, and has an equal right to decide for itself what is the meaning of the Constitution in the cases submitted to its action, and especially where it is to act ultimately and without appeal.[1]

But I think that we may take it as being beyond doubt that the charge that the Supreme Court has been guilty of usurpation is unfounded, and that the authors of the Constitution, or at any rate the leading men among them, clearly anticipated and intended the exercise by the judiciary of a control over the legislature; and that the reason why they did not more expressly so provide in the text of the Constitution was that they regarded the matter as obvious.[2]

However that may be, the founders must be deemed to have intended the inevitable consequences of their acts; and it is impossible to conceive how the limitations of the Constitution could have been maintained otherwise than by the recognition of the power and duty of the Supreme

[1] Letter to Judge Roane, 6 January, 1819. *Writings of Jefferson*, ed. H. A. Washington, Vol. VII, p. 133.

[2] "That the members of the Convention of 1787 thought the Constitution secured to Courts in the United States the right to pass judgment on the validity of Acts of Congress under it, cannot be reasonably doubted." Corwin, *The Doctrine of Judicial Review*, p. 10. "By a limited Constitution I understand one which contains certain specified exceptions to the legislative authority, such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice in no other way than through the medium of Courts of Justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void." Hamilton, No. 78, *The Federalist*. And see Warren, Vol. I, p. 256.

Court to adjudicate upon the conformity to its provisions of the acts of the legislatures. If this jurisdiction had not been recognized, not only would it have been impossible, as I have already remarked, to resolve the conflicts which have in fact continually threatened between the States and the Federal Government, but, since it would have been impossible to deny to the Executive the independence accorded to the legislature, the President also would have been invested with, at any rate, a temporary dictatorship.

In any case, this question has long passed out of the field of controversy; nobody nowadays seriously disputes the necessity of the judicial enforcement of the Constitution; and the only questions now debated—and, as we know, they are debated with some ardour—is whether in performing its necessary task the Court is governed by sufficiently enlightened principles, and, if it is not, how it can best be steered on to the right lines.

It is perhaps desirable for me to explain, before I go further, that the Court never raises a constitutional objection to the validity of a Statute of its own motion, as a matter of public policy; there is always a presumption that a Statute is valid, and its validity can be put in issue only by a party to the litigation who has an adequate interest, either of a personal or of a public character, in doing so; moreover the right to assert the unconstitutionality of a Statute may be denied because it has been waived, or because the party alleging it is stopped from so doing.[1] These propositions emphasize and illustrate the principle that the Court will go no step further as a censor of the laws than is strictly necessary for the decision of issues actually in litigation before it.

There is another topic upon which I must touch parenthetically, and that is the topic of Federal Common Law. The jurisdiction of the Federal Courts is, of course, far

[1] For a discussion of this subject see the dissenting judgment of Brandeis, J., in Ashwander *v.* Tennessee Valley Authority, 1935. Chief Justice Marshall, in Marbury *v.* Madison, would appear not to have anticipated the principle that constitutional pleas must be pleaded; for Madison was not represented.

from being confined to adjudication upon the constitutional validity of Federal and State Statutes. Upon the Federal Courts devolves the general task of enforcing Federal Statutes, whether civil or penal in character. The Federal Courts have exclusive jurisdiction in admiralty, a jurisdiction to which a wide application has been given in the United States by its extension, *ratione loci*, to all inland navigable waterways. Then there is the large category of cases, of which I have already spoken, which comes to the Federal Courts by reason of diversity of citizenship. Then again the Supreme Court possesses an original jurisdiction in suits between States. Now the question which I am raising is whether there is a recognized common body of non-Statute law, distinct from that of the several States, which is applied by the Federal Courts in the exercise of these various branches of jurisdiction, in default of, or by way of necessary supplement to, relevant provisions in the Constitution or in pertinent Statutes. Is there such a thing as Federal Common Law? The answer is not very simple, but I do not apologize for attempting to give it, because whatever general principles are acted upon by the Federal Courts, with the approval of the Supreme Court, are relevant to a study of the Constitutional Law of America. Well, there is one principle which is quite clear and certain, and that is that there is no such thing as a Federal Common Law of Crimes. That was laid down long ago, in United States *v.* Hudson, decided by the Supreme Court in 1812, in which an indictment for a newspaper libel upon the President and the Congress of the United States was quashed on the ground that to support such an indictment "the legislative authority of the Union must first make [the] act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."[1,2]

[1] This case was followed four years later in United States *v.* Coolidge (1816), without argument, in spite of a vigorous dissenting judgment by Mr. Justice Story.

[2] The rule that there are no common law offences against the United States does not apply in the District of Columbia, because the territory was originally part of Maryland and the common law of Maryland was adopted for the District by Act of Congress.

But here I must mention the remarkable case of *in re* Neagle which was before the Supreme Court in 1890.[1] In the year 1889 a very distinguished justice of the Supreme Court, Mr. Justice Stephen J. Field, whose duty it was to act as circuit judge for California, had incurred the deadly enmity of an exasperated litigant, named Terry. Terry had frequently threatened to assassinate the judge; and in consequence of these threats the Attorney General of the United States had appointed one Neagle, an acting deputy United States Marshal, to attend the judge wherever he went in California in order to protect him from attack. On 14 August 1889 Terry attacked Field in the railway restaurant at the town of Lathrop, and Neagle immediately shot him dead. Neagle was forthwith arrested by the State authorities and committed to the custody of the Sheriff of San Joaquim County. From that custody he was speedily discharged on *Habeas Corpus* by order of the United States Circuit Court, and an appeal from that order was dismissed by the Supreme Court. Mr. Justice Miller, in his judgment, observed that though Neagle could point to no Federal Statute which authorized his act, he could certainly claim immunity on the ground that he was acting under the authority of the President of the United States, who, in his turn, undoubtedly had the power to take measures for the protection of a Federal judge who, while in the discharge of his duties, was threatened with assassination. The interest of this case is that it seems to imply that if there is no positive Federal Common Law of Crimes, there is a negative Common Law. There is no Federal Common Law which says: "In such and such circumstances you shall be punished," but there is a Federal Common Law which says: "In such and such circumstances you shall not be punished, even under State Law."

Turning to the civil side we must, in the first place, dis-

[1] For a full account of the circumstances of this case and of the events which led up to it, see *Life of Stephen J. Field*, C. B. Swisher, Washington, 1930.

tinguish between Common Law in the strict sense, on the one hand, and the equity and admiralty jurisdiction on the other. As to equity jurisdiction, it has been laid down authoritatively from the bench of the Supreme Court that "The equity jurisdiction conferred on the Federal Courts is the same as that the High Court of Chancery in England possesses; is subject to neither limitation nor restraint by State legislation, and is uniform throughout the different States of the Union."[1] Very similar principles are true of the admiralty jurisdiction.[2]

As regards the Common Law jurisdiction of the Federal Courts (in the strict sense) the opposite principle was laid down from the outset, by the Judiciary Act of 1789. Section 39 of this Act[3] provided that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require, shall be regarded as rules of decision in trials at Common Law in the Courts of the United States in cases where they apply." A recent writer comments as follows upon this section:[4] "It is generally said that in the main the Federal Courts will follow the decisions of the State Courts declaring the unwritten or non-statutory law, at least on questions of local importance; but as a matter of fact this rule is practically confined to State decisions establishing the law of real property. The Federal Courts consider themselves bound by State decisions in such cases; but even then if the State decisions are not clear, or if the State Supreme Court has reversed itself, or the question is otherwise balanced with doubt, the Federal Courts will not feel themselves bound by State decisions. And wherever the questions are of general or commercial interest the Federal Courts will not follow the judge-made law of the highest State Courts but will make

[1] Brewer, J., in Mississippi Mills *v.* Colin (1893), citing an earlier case.
[2] Willis, p. 272.
[3] Section 725 of the Judicial Code.
[4] Willis, p. 979 ff.

their own Common Law upon the subject."[1] I have already given an illustration of this attitude of the Supreme Court in speaking of the taxi-cab case. In that case Mr. Justice Holmes pronounced a lively and characteristic dissenting judgment, in which he criticized the doctrine that there exists "one august corpus" of the Common Law, common to England, the British Empire, and all American jurisdiction saving Louisiana. "If there were such a transcendental body of law . . . the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law." The Common Law in any particular jurisdiction is what the Courts of that jurisdiction say it is.

It is obvious that there is a Federal Common Law of the Constitution, built up out of the ruling decisions of the Supreme Court on Constitutional issues. But on this subject it is necessary to observe that the Supreme Court has by no means always held itself to be bound by its own precedents, but has not infrequently reversed itself. Mr. Justice Brandeis a few years ago, in a dissenting judgment, spoke as follows:[2] "*Stare decisis* is not, like the rule of *res judicata*, a universal, inexorable command . . . *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true, even where the error

[1] The leading case on the uniformity of Commercial Law is Swift *v.* Tyson (1842), in which, in an action on a bill of exchange made in New York, the Supreme Court, by the mouth of Mr. Justice Story, refused to follow the doctrine of New York Court to the effect that a pre-existing debt does not constitute a valuable consideration applicable to a negotiable instrument. In Central Vermont Railway Co. *v.* White (1915) the Supreme Court decided that whatever the State Law might be, the burden of proving contributory negligence must be borne by the defendant.

In Funk *v.* U.S. (1933) the Supreme Court held it to be a rule of Federal Common Law that a wife is competent to testify for her husband. In Gelpcke *v.* Dubuque (1864) the Court held that where the highest Court of a State had reversed a line of previous decisions, and by so doing had invalidated contracts previously held to be valid, the Supreme Court would not follow the last local decision.

[2] Burnet *v.* Coronado Oil & Gas Company (1931).

is a matter of serious concern, provided that correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, the Court has often overruled its earlier decisions. The Court bows to the lessons of experience and to the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." And in footnotes to this judgment the judge gave long lists of reversals by the Supreme Court of its own previous decisions, including not only cases where the correction could otherwise only have been secured by a Constitutional amendment, but also of cases where that result could have been realized by ordinary legislation.[1]

I have now said enough by way of preliminary explanation of the functions of the Supreme Court, and I will ask you to follow me to an examination of the use which it has made of its great powers.

[1] In interpreting the Constitution or Acts of Congress the Supreme Court is by no means averse to listening to, or to adopting, reasoning based upon the reports of debates in legislative bodies or upon official reports. Illustrations may be found in Binns *v.* U.S. (1909), and in Kansas *v.* Colorado (1907). Professor Corwin records that "Senator Roscoe Conkling, a former member of the famous Joint Committee on Reconstruction, in which the 14th Amendment was framed, introduced in argument before the Court passages from the Committee's journal with the purpose of showing that the protection of the amendment against discriminatory State legislation had been by no means intended solely for the new class of Freedmen . . . but had been meant to embrace all 'persons,' Corporations included, in all their rights." *Twilight of the Supreme Court*, p. 75.

In a recent case it was said that "while the general rule precludes the use of [reports of debates in Congress] to explain the meaning of the words of the Statute, they may be considered as reflecting light upon its general purposes and the evils which it sought to remedy." Rathbun *v.* U.S. (1935).

In a still more recent case, Wright *v.* Mountain Trust Bank (1937), Mr. Justice Brandeis, speaking for the Court, said: "the act does not in terms provide for the right to protect the mortgagee's interest in the property by bidding at such sale. . . . But the Committee reports and the explanations given in Congress make it plain that the mortgagee was intended to have this right. We accept this view of the Statute." And he supported his statement as to the proceedings in Congress by full references.

In the exercise of its power of declaring Statutes to be unconstitutional the hand of the Supreme Court has at all times been heavier upon the Acts of the State legislatures, than upon Acts of Congress; this, no doubt, has been largely due to the fact that there were many more of them. It is only since the Civil War, and more particularly during the last forty years, that Acts of Congress in any numbers have been held unconstitutional. It is interesting, by the way, to notice that Lord Bryce, writing in 1888, says that the Supreme Court has rarely found it necessary to exert its power to declare an Act of Congress to be inconsistent with the Constitution.[1] The figures are as follows: in the first 73 years of its existence, from 1791 to 1869, the Court condemned only two Federal Statutes. In the following 71 years, from 1865 to 1935, 62 Statutes and two Joint Resolutions have been invalidated.[2] And of these condemnations 52 have been pronounced since the year 1890.

I would not have you think, however, that these figures are to be explained only or principally by an ever-increasing dissidence between the Court and the Congress and to an invincible attachment of the majority of the justices to

[1] Bryce, 2nd edition, Vol. I, p. 262, n. 1. This note is omitted from the 3rd edition.

[2] Warren, *Congress, the Constitution, and the Supreme Court*, pp. 134 and 304 ff. The figures given above are not identical with those given by Mr. Warren, but have been obtained by applying Mr. Warren's corrective observations. Mr. Warren remarks that of his total of 71 adverse decisions between 1865 and 1935, "ten were cases in which the Act of Congress was not held invalid, but in which a valid Act of Congress was applied by officials of the Government to a subject or in a manner which violated the provisions of the Constitution."

The following figures are given on page 18 of the *Report of the Senate Judiciary Committee on the Ashurst Bill for the Reorganization of the Federal Judiciary* (7 June 1937). "In 148 years, from 1789 to 1937, only 64 Acts of Congress have been declared unconstitutional—64 Acts out of a total of approximately 58,000. These 64 Acts were held invalid in 76 cases, 30 of which were decided by the unanimous vote of all the justices, 9 by the agreement of all but one of the justices, 14 by the agreement of all but two, another 12 by the agreement of all but three. In 11 cases only were there as many as four dissenting votes when the laws were struck down."

unfashionable doctrines of *laissez faire*. To a certain extent and particularly in recent years, this explanation has some foundation. But the principal cause of the increasing number of verdicts of unconstitutionality is to be found in the ever-increasing output of legislation in novel and unexplored fields. And I think you may take it that the Court has always decided far more often favourably than adversely to Acts of Congress whose validity has been called in question before it.[1] And in considering this subject, it must not be forgotten that it was the express object of the Constitution to clip the wings of the legislatures; and that this fear of the vagaries of elected persons was not a transitory feeling peculiar to the men of 1787, but has shown its strength again and again ever since in the new and often revised State Constitutions.

But I am anticipating, and must go back to the beginning.

As I have already said, in the first 73 years of its existence it was only on two occasions, and in two cases, that the Supreme Court held an Act of Congress to be invalid. These two cases were Marbury *v.* Madison, decided in 1803, and Sandford *v.* Scott, decided 54 years later, in 1857. And about these two cases I must now speak at large.

At the beginning of the nineteenth century the heart of American politics lay in the conflict between the Federalists, who desired to fortify the national government and the principle of union, and the anti-Federalists, who afterwards evolved into the Democratic party, who stood for State Rights, and feared the pretensions of the central authority. In parenthesis, let me say that even the Civil War did not avail to set this issue completely at rest, and that, at the present day, it still has the power to stir political feeling.

At the presidential election in the autumn of 1800 the Federalist president, John Adams, was defeated by the anti-Federalist, Thomas Jefferson—an event which the Jeffersonians afterwards spoke of as "the revolution of 1800." On the eve of surrendering his office, President Adams appointed

[1] See previous footnote.

a number of justices of the peace for the District of Columbia, among them one William Marbury. The appointments were confirmed by the Senate, and the seal of the United States was affixed to them by John Marshall, the then acting Secretary of State. Marshall had already been appointed Chief Justice of the United States, but continued to hold the two offices together until the end of Adams's term. Of these commissions four, including that of Marbury, though duly approved, signed and sealed, had not been delivered when Adams's term expired at midnight on 3 March 1801; and President Jefferson, on coming into office, at once ordered that they should be withheld.[2]

In December of the same year, Counsel for Marbury moved in the Supreme Court for a rule requiring the new Secretary of State, James Madison, to show cause why a mandamus should not issue directing him to deliver the commission. The rule was granted, but Madison ignored it. As the Court did not sit again for fourteen months, it was not until February 1803 that Marbury's Counsel moved for the issue of a mandamus. On 24 February the Chief Justice delivered his celebrated judgment. The Court, he said, had to decide three questions: first, has the applicant a right to the commission he demands? Second, if he has a right, and that right has been violated, do the laws of this country afford him a remedy? And third, if they do afford him a remedy, is it a mandamus issuing from the Supreme Court? The two first questions the Chief Justice answered in the affirmative; Marbury had been duly appointed, he had a right to receive his commission, and that right had been illegally withheld. This was a plain case for a mandamus; and the only question which remained was whether the writ could issue from the Supreme Court. The Act of Congress establishing the judicial Courts of the United States authorized the Supreme Court "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any Courts appointed, or persons holding office,

[1] Warren, I, p. 200.

under the authority of the United States." And so, at first sight, it would seem that the third question should likewise be answered in the affirmative, and that the writ should issue. But the Constitution provides that the Supreme Court shall have original jurisdiction in cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party; and that in all other cases it shall have appellate jurisdiction. The Act of Congress relied upon by the petitioner, by purporting to invest the Court with a general jurisdiction to issue writs of mandamus to public officers, ignored this provision of the Constitution, and was therefore itself unconstitutional. "The question," he said, "whether an Act repugnant to the Constitution can become the law of the land is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest." "It is a proposition too plain to be contested, that [either] the Constitution controls any legislative Act repugnant to it; or that the legislature may alter the Constitution by an ordinary Act. Between these alternatives there is no middle ground. The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative Acts, and, like other Acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative Act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable." "It is emphatically the province and duty of the judicial department to say what the law is. . . . If two laws conflict with each other, the Courts must decide on the operation of each. So, if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the Court must determine which of these conflicting rules governs the

case. This is of the very essence of judicial duty. . . ." "The rule must be discharged."

It might be supposed that this first assertion by the Supreme Court of its authority to hold an Act of Congress void would have excited great public attention and probably criticism. The decision did excite much public attention but, strange as it may seem, not for the reason which makes it a great landmark in American constitutional history, but because it expressly and unnecessarily asserted Marbury's right to his commission, and by implication declared that a mandamus to enforce its delivery could lawfully be issued by an inferior Federal Court.'[1]

I must now carry you on for 54 years, to the year 1857, in which year the Supreme Court for the second time held a Federal Statute to be unconstitutional and therefore void. This was in the case of Dred Scott *v.* Sandford, of which it has been commonly said that it was one of the principal causes of the Civil War.

But in order to explain the Dred Scott case, I must first mention certain political transactions which took place in 1820. In that year the slavery question, and particularly the question whether the institution of slavery should be extended to the new territories and States to be founded west of the Mississippi, was beginning to take shape as a first-class political issue. In the hope that it was providing a quietus for this controversy, Congress passed an Act, known as the Missouri Compromise, which provided for the admission of the new State of Missouri as a slave State, but declared that all the rest of the north-western territories[2] north of 36° 30′ north latitude should be and remain free.

In 1834 Dred Scott, a negro slave, had been taken by his master, an army surgeon of the name of Emerson, from Missouri into the free State of Illinois, and thence to Fort Snelling, in what is now the State of Minnesota, and was then in the territory governed by the Missouri Compromise. In 1838 Emerson returned to Missouri, taking Dred Scott

[1] Warren, I, pp. 243 ff. [2] Included in the Louisiana purchase.

with him. In the subsequent litigation Scott claimed that his temporary residence in free soil had irrevocably emancipated him. In 1846, Emerson having died, Scott began a suit against his widow in the Missouri State Courts in vindication of his liberty; but though he obtained a verdict in the trial Court, the Supreme Court of the State held, in 1852, that under the laws of Missouri he had resumed his servile condition, irrespective of his status while out of the State.

In November 1853, a firm of laywers of anti-slavery sympathies in St. Louis instituted on Scott's behalf, in the United States Circuit Court, a suit for assault, and in order to vest jurisdiction in the Federal Court on the ground of diversity of citizenship, a fictitious sale of Scott was arranged by Mrs. Emerson to her brother, a Mr. John Sandford, a citizen of New York.[1] In this suit a verdict was found against Scott, and the case was taken on writ of error to the Supreme Court of the United States. The cause was argued in February and again in December 1856, and the opinions of the judges were delivered on the 6th and 7th of March, 1857.

The decision of the Court was adverse to Scott by a majority of seven to two. The leading opinion was given by Chief Justice Taney, who first discussed the question whether Scott was a citizen of the United States, and as such entitled to bring suit in the Federal Court. This question the Chief Justice decided in the negative, on the ground that, even if the petitioner were a free man, he was incapable of being a citizen within the meaning of the Constitution because he was a Negro, and a descendant of African slaves, a class of persons upon whom the Constitution was not intended to confer rights.

This finding would by itself have been enough to dispose of the case. But Taney, in common with several of his colleagues, had unfortunately come to believe that if they took a wider view of the issues before them they would render a public service by allaying embittered controversies. The Chief Justice, therefore, went on to discuss two further

[1] Warren, Vol. II, p. 281.

questions: had Scott acquired an indefeasible status of freedom by his residence in the State of Illinois, or, in the alternative, had he done so by his residence in the free territory? Both these questions were answered in the negative. The freedom Scott acquired in Illinois was conferred only by State law; there was no reason why the law of Illinois should be allowed to prevail over the law of Missouri, under which he was undoubtedly a slave. Then comes the major point of the opinion. It might be, the Chief Justice said in effect, that the free status which Scott claimed to have acquired during his residence in the free territority, being derived from a Federal act, would prevail over the law of Missouri if the Federal act in question, the Missouri Compromise Act, had been a valid law. But it was not. "The right of property in a slave is distinctly and expressly affirmed in the Constitution," he said, ". . . and no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description."

"It is the opinion of the Court that the Act of Congress which prohibited a citizen from holding or owning property of this kind in the territory of the United States north of the line therein mentioned is not warranted by the Constitution and is, therefore, void."[1]

This decision, by destroying the popular belief that it lay in the power of Congress, that is to say of ordinary political methods, to regulate the extension of the slave power to the West, far from having the effect of an *eirenicon*, raised the temperature of the slavery controversy to a point from which it did not recede until Fort Sumter was fired upon four years later and the conflict passed from the field of politics to the field of battle.[2]

[1] In attempting to give in a few words the effect of Chief Justice Taney's judgment—which we are told took two hours to deliver—I have omitted all reference to a procedural point to which much space was given; and have prayed in aid some parts of Mr. Justice Nelson's concurring judgment. Dred Scott was emancipated three months after the decision of the Supreme Court. Warren, Vol. II, p. 302.

[2] Warren, Vol. II, pp. 302 ff.

LECTURE III

THE DUAL GOVERNMENT AND THE COMMERCE CLAUSE

PURSUING the discussion of the way in which the Constitutional law of America has been built up by the decisions of the Supreme Court, I shall now adopt a division of my subject into two main heads. I shall speak first of some of the principal cases which have elaborated and defined the relationship between the Federal Government and the States; and afterwards I shall go on to discuss the case-law of those parts of the Constitution which impose limits upon the powers of Congress and of the State legislatures for the protection of individual rights.

McCulloch *v.* Maryland

One of Chief Justice Marshall's most famous decisions was that given in the year 1819, in the case of McCulloch *v.* Maryland, in which two questions were adjudicated upon; the first, whether Congress had the power to charter a National Bank; and the second, whether a State had the power to impose a tax upon the notes issued by a bank so chartered. Both these questions raised fundamental issues of Constitutional principle. The question of the legitimacy and desirability of a national bank had been a subject of heated controversy from the first days of the Republic. In the words of a recent historian,[1] "a large portion of the American people have never felt affection for banks; [and] in those days the mysteries of the banking business were to many persons as hateful as they were obscure." Nevertheless, largely under the influence of Alexander Hamilton, Washington's Secretary of the Treasury and the leader of the Federalist Party, a National Bank was chartered in 1791

[1] McLaughlin, p. 229.

for a term of twenty years. "At the expiration of its charter in 1811, in spite of its proven service to the Government and to the business public through times of severe financial stress, it had become an object of general odium. This was due partly to the fact that it was under the almost complete control of the Federalists, who, it was believed, used it as a political machine, partly to the fact that its stock was largely held by British and other foreigners, and partly to the extreme jealousy of the State Banks. But in spite of these antagonistic factors, the necessity for its re-establishment became increasingly apparent, by reason of the unsettlement of business by the war of 1812, and the over-issue of bank paper and suspension of specie payments by the State Banks. Accordingly, amidst hot political opposition, the second Bank of the United States was incorporated in 1816."[1]

In February 1818 the legislature of the State of Maryland enacted a Statute laying a heavy stamp tax on all notes issued by banks chartered outside the State, and therefore, *inter alia*, upon the notes of the Bank of the United States, which had a branch in Maryland. Three months later an informer, suing on his own behalf and on behalf of the State of Maryland, brought an action of debt against James McCulloch, the cashier of the Bank, to recover a penalty of 100 dollars for having put into circulation an unstamped banknote. The plaintiff was successful in the Maryland Courts, and the case was then brought by writ of error before the Supreme Court, where it was argued for nine days.

The unanimous judgment of the Court was delivered by the Chief Justice on 6 March 1819. The first question, he said, was whether Congress had power to incorporate a bank. This question raised issues of great generality as to the interpretation of the Constitution. It was contended for

[1] Warren, I, p. 504. In 1833 President Andrew Jackson dealt a death blow to the second Bank by directing the removal from its custody of the public funds. After its expiration in 1836 the second charter was not again renewed.

the State of Maryland that the powers of the general government were delegated powers, derived from the States, which alone were truly sovereign.

Implied Powers

This contention, said the Chief Justice, is historically untrue. The Constitution was derived, not from the States, but from the people at large, assembled in conventions. Consequently the Federal Government possesses an independent sovereignty, not less original than that of the States. "The Government of the Union, though limited in its powers, is supreme within its sphere of action." It is true that among the enumerated powers we do not find that of establishing a bank, or of creating a corporation. "But there is no phrase in the instrument which . . . excludes incidental or implied powers, and which requires that everything granted shall be expressly and minutely described." Furthermore, the Constitution expressly grants to the Congress the power to make "all laws which shall be necessary and proper for carrying into execution" its other, enumerated, powers. "The sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people." It is clear that a national banking corporation is an appropriate instrument for the discharge by the Federal Government of its responsibilities; and if it is appropriate, the degree of its necessity "is to be discussed in another place."

Taxation of Federal Agencies

Having thus established for the future, in language of which I have only given the barest summary, not only the legality of a National Bank, but the fundamental constitutional principle that Congress must be deemed to possess a wide, though not an unrestricted range of implied powers,[1]

[1] For a later exposition of this principle see the judgment of Strong, J. in the Legal Tender cases (1871), in which he pointed out that the Constitution does not expressly invest the Federal Government with power to make contracts, to sue, or to build a national capital, which powers it nevertheless undoubtedly has.

the Chief Justice went on to discuss the second question, whether the State of Maryland might, without violating the Constitution, tax the Bank. This question the Court answered with an emphatic negative. "The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission," but does not extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States. "The power to tax involves the power to destroy," and though it need not be assumed that the power to tax will inevitably be used to destroy, it is not reasonable, in interpreting the Constitution, to suppose that the general body of the people intended to entrust to the citizens of any one State, such as Maryland, the power to control the operations of the Government which alone represents them all. "This is a Tax on the operations of the Bank, and is consequently a Tax on the operation of an instrument employed by the Government of the Union to carry its powers into execution. Such a Tax must be unconstitutional."

The principle here laid down, that a State has no power to tax the instrumentalities of the Federal Government, has received numerous applications. It has been held, for instance, that a State cannot tax a Federal franchise, and in particular that it cannot tax the franchise of a railroad incorporated by Federal Statute—which does not mean that it cannot tax the property of such a railroad;[1] a State cannot tax realty belonging to the United States within the State limits;[2] nor can it tax United States bonds, nor measure a tax by income derived from such bonds;[3] nor can it tax, as income, royalties received by one of its citizens for the use of a Federal patent;[4] nor can a State tax the salaries of Federal officers.[5, 6]

[1] California *v.* Central Pacific R.R. Co. (1888).
[2] Van Brocklin *v.* Tennessee (1886).
[3] Macallen *v.* Massachusetts (1929). [4] Long *v.* Rockwood (1928).
[5] Dobbins *v.* Commissioners of Erie County (1842).
[6] It need hardly be said that the question when a tax is to be held to be a tax on an instrumentality of the Federal Government has given rise to much litigation, and to many fine distinctions.

Federal Taxation of State Agencies

But, as is only just, a similar principle has been held to be applicable in the converse case: a Federal tax cannot constitutionally be laid upon an instrumentality of a State Government. In The Collector *v.* Day (1870) the Supreme Court held that a Federal Income Tax could not be enforced against a Massachusetts State Judge; and in the Mercantile Bank *v.* New York (1887) it was held that State bonds, and the income from State bonds, are exempt from Federal taxation.

An interesting case on the other side of the line is South Carolina *v.* the United States (1905). The State had established a government monopoly for the sale of liquor, which was salable to the public only in the State liquor shops or dispensaries, as they were called. The officials of the United States demanded and collected from the dispensers the licence duties prescribed by the Federal revenue laws: and the State brought action in the Court of Claims for the recovery of the money so paid. The Supreme Court on appeal sustained the tax. Mr. Justice Brewer, giving the leading judgment, said that it could not be doubted that the regulation of the sale of liquor came within the scope of the police power, and it was equally true that the police power is in its fullest and broadest sense reserved to the States. But this did not dispose of the question of the Federal taxing power. "There are some," he went on, "insisting that the State shall become the owner of all property and the manager of all business. . . . If this change should be made in any State, how much would that State contribute to the revenue of the nation?" Immunity from Federal taxation cannot be rested upon the sole fact that a business is conducted by and for the State. "The exemption of State agencies and instrumentalities from national taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by a State in the carrying on of an ordinary private business."

The Police Power

Since this is the first time I have had occasion to quote these dynamic words "the police power" it seems a suitable

moment at which to say something more about them. The expression "the police power" seems to have been first used in a Supreme Court judgment in a decision of Chief Justice Marshall's in 1827,[1] when he used it in speaking of the necessary reserve power of the States to regulate the way in which gunpowder and other dangerous commodities should be stored or disposed of. Once having been introduced into the recognized vocabulary of the law, the expression became firmly established and proved to have potent value for the designation of all legislation, which, though not specifically authorized, constitutes a legitimate interference with private rights in the interest of public safety, public health, or public morals. It has been said that by the doctrine of the police power "the public welfare was . . . erected into a judicially cognizable justification of legislative activity, even when it touched property rights."[2]

Sixty years ago it was ironically said that "the police power is open to the suspicion of being a convenient phrase to cover acts which cannot be justified by the letter of the Constitution, but which are nevertheless necessary."[3] More recently, and more benevolently, it has been said that "the police power of a State . . . ultimately means that degree of interference with individual freedom of action or with use of private property in the interest of public welfare, which the Judiciary considers not to be arbitrary, or not to be unduly violative of natural rights in commerce between the States, at any given time and in the light of prevailing conditions."[4]

The precise meaning and extent of the police power have never yet been exactly defined, nor, so long as the Constitution of the United States exists, will it ever be; but its meaning is perpetually in process of definition, because it is brought into debate in almost every Supreme Court case

[1] Brown *v.* Maryland; cf., Warren, Vol. I, p. 695, n. 2.
[2] Corwin, *The Twilight of the Supreme Court*, p. 65.
[3] Warren, II, p. 584, quoting a comment in the *American Law Review* on the Granger Cases (1877).
[4] Warren, II, p. 740.

in which the issue is joined between individual rights and constitutional limitations on the one hand and the demands of social order on the other. The police power has sometimes been used to mean the whole domain of legislative sovereignty where it has not been limited by constitutional restrictions.[1]

The Commerce Clause

The subject which has given most frequent occasion for controversy and litigation about the respective powers of Congress and the States, and the frontier set between them by the Constitution, is the so-called "Commerce Clause."[2] You will perhaps remember that among the enumerated powers of Congress is the power "to regulate commerce with foreign nations and among the several States, and with the Indian tribes."[3] I have nothing to say about commerce with foreign nations, or about commerce with the Indian tribes; but there is a good deal to be said about the regulation by Congress of commerce among the several States —inter-State commerce, as it has come to be called.

The interpretation of the Commerce Clause has raised two principal questions. The first is the question—what is the extent and domain of the power of Congress under this clause? In other words, what is commerce? And what is regulation? And the second is the question, to what extent if at all does the Commerce Clause leave to the States any residuary or concurrent power of legislating for inter-State commerce?

For the first thirty years of the Republic the Commerce Clause attracted little attention, and was generally supposed to do no more than to authorize Congress to impose taxes on goods and on the vessels carrying them.[4]

Gibbons v. Ogden

Then in 1824 there came Marshall's famous judgment in the Steamboat case, the first decision of the Supreme Court on the Commerce Clause, by which, once and for all, a far broader meaning was given, both to the word "commerce"

[1] Thayer, *Cases on Constitutional Law*, Vol. I, 693 n.
[2] Frankfurter, *The Commerce Clause*, p. 66.
[3] Article I, § 8.
[4] Warren, I, p. 610.

and to the word "regulate," than they had hitherto been supposed to bear.

The Steamboat case, or Gibbons *v.* Ogden, came before the Supreme Court in the following way.

In the year 1808 the legislature of New York State had granted to Robert Fulton, the inventor of the steamboat, and to his partner Robert Livingston, a monopoly for the navigation by steamboat of all waters within the State. One Aaron Ogden had obtained, by assignment from the owners of the franchise, the right to operate steamboats between New York City and various points in New Jersey, on the other side of the Hudson River. One Thomas Gibbons, disregarding the exclusive privilege claimed by Ogden, started to run two steamboats between New York and Elizabeth Town in New Jersey. Gibbons's steamboats had been licensed for the coasting trade under a Federal Statute. Ogden took proceedings in the New York Court of Chancery; and, Chancellor Kent having granted an injunction, Gibbons brought the decree by writ of error before the Supreme Court. The Chief Justice pointed out, not for the first time, that when a Federal Act comes into conflict with a State Statute, the Federal Act must prevail if it is constitutional. In this case the Federal Statute invoked by Gibbons, the interloper, was plainly in conflict with the New York Act upon which Ogden rested his claim of a monopoly. The question to be decided, therefore, was whether the Act of Congress under which a licence had been granted to Gibbons for navigation in and between the waters of New York and the waters of New Jersey, was authorized by the Commerce Clause.

It had been contended by Ogden's counsel that "commerce" in that clause meant only "traffic," "buying and selling," or the interchange of commodities, and could not be understood to comprehend navigation. "Commerce undoubtedly is traffic; but," said the Chief Justice, "it is something more, it is intercourse. It describes the commercial intercourse between nations, and parts of nations,

in all its branches." It certainly includes navigation. The power to regulate, again, means the power to "prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised in its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution." In particular, it is not limited by the fact that the regulation of inter-State commerce may often require regulation of what is done within the boundaries of States, as in the present case. It is not possible to give effect to Gibbons's Federal licence without overriding Ogden's New York monopoly, even in New York territorial waters. And if the constitutional power of Congress can never make itself felt inside the limits of a State, it can seldom effectively regulate inter-State commerce.[1]

So the judgment of the Court was that the decree be reversed and the bill be dismissed.

Of this judgment it has been said that "it has done more to knit the American people into an indivisible nation than any other one force in American history except war".[2] But although in his judgment in Gibbons *v.* Ogden Marshall had expounded in the widest terms the power of Congress over inter-State commerce, it was long before the means of communication between different States were sufficiently developed, and the organization of commerce and industry in the country at large became sufficiently complex, to appear to Congress to call for important measures of Federal regulation.

It was not till two generations had passed that Congress took the first steps to deal with a problem of inter-State commerce of great magnitude and importance which had become insistent, namely, the problem of railroad regulation. In the year 1887 an act known as the Inter-State Commerce

[1] The reader will, it is hoped, appreciate that in summarizing this judgment, which is very long, I have, of necessity, made the utmost use of the licence permitted to the paraphraser.

[2] Beveridge, *Life of Chief Justice Marshall*, Vol. IV, p. 429.

Act was passed, and the Inter-State Commerce Commission was established, measures which were mainly directed to the regulation of railway rates, and to the prevention of rates which were unfair or discriminatory as between persons and places. I cannot now enlarge upon the subsequent history of these measures, or upon the successive amendments which were adopted to meet the resistance of the railways, and the difficulties raised by certain decisions of the Supreme Court. The subject is too large for the scope of these lectures.[1] I must content myself with saying that, particularly since the beginning of the century, Congress has passed a number of Statutes which have had for their object the public safety and the improvement of the conditions of labour engaged in inter-State transport, and almost all these Statutes have been upheld by the Supreme Court.[2]

Until the year 1903 Congress had confined the exercise of its powers under the Commerce Clause almost entirely to the subjects of common carriers, intoxicating liquor, and trusts.[3] But in 1903, in the great case of Champion *v.* Ames, the Supreme Court upheld an Act of Congress passed in 1895 which prohibited the carriage in inter-State commerce, that is to say in the mails, of lottery tickets. This decision, by recognizing in effect a Federal police power, considerably extended, or supplemented, the powers which Congress derived from the Commerce Clause, and opened the way for a Pure Food Act in 1906, a Meat Inspection Act in 1909, Narcotics Acts in 1909 and 1914, the Webb-Kenyon Act, which, before National Prohibition, prohibited the shipment of liquors in inter-State commerce into dry States, and various other Federal laws which attached penalties to the transportation of forbidden goods from State to State.[4] An unfriendly critic of the legislative consequences of the decision in Champion *v.* Ames used the following language:

[1] Cf., F. D. G. Ribble, *State and National Power over Commerce*, 1937. On page 118 of this work a list is given of thirty-nine Federal Statutes dealing with inter-State commerce between 1888 and 1935.

[2] Warren, II, pp. 729 ff.

[3] Warren, II, p. 735.

[4] Warren, loc. cit.

"This case was undoubtedly the Pandora's box from which burst forth with amazing speed and ever-increasing velocity the tendency to federalize and centralize, beyond the dreams of Alexander Hamilton, a government whose centripetal forces had already been too greatly strengthened as a result of the Civil War. It was the beginning of that steady, unending, unceasing movement in Congress to stretch far beyond its real meaning and far beyond what any fair construction, however liberal, warranted, the Commerce Clause of the Constitution. This movement has progressed so steadily, has been pressed so persistently, and has gone so far that it threatens to utterly annihilate our dual system of government, to utterly annihilate the police powers of the several States, and finally to be about to deprive our people of the inestimable blessings of local self-government, unless it be checked speedily and sharply."[1, 2]

But it was an exaggeration, even in 1917, when this protest was published, to suggest that the Supreme Court had given Congress an entirely free hand in the regulation of inter-State commerce. In the year 1908 the Court, in a group of cases known as the Employers' Liability cases, decided against the constitutionality of an Act of Congress which abolished, in favour of the employees of inter-State railroads who were injured or killed in such employment, the defences of the fellow-servant rule and the assumption of risk, and, within limits, the defence of contributory negligence.

[1] "The Regulation of Commerce between the States," T. W. Hardwick, *American Bar Association Report*, 1917 (cited by Warren, II, p. 738).

[2] Peril to the autonomy of the States seems at all times to have had a peculiar efficacy in stimulating printed eloquence. In 1821, in an article commenting on Marshall's judgment in Cohens *v.* Virginia (in which he held that an appeal against a conviction in a State prosecution was not a suit instituted against a State, and therefore not contrary to the 11th Amendment) the *Richmond Inquirer* wrote: "The judiciary power, with a foot as noiseless as time, and a spirit as greedy as the grave, is sweeping to their destruction the rights of the States. These encroachments have increased, are increasing, and must be diminished" (cited by Warren, I, p. 552).

In the course of his judgment, which was the leading judgment, Mr. Justice White (as he then was, for he afterwards became Chief Justice) adverted to the contention that the Act was constitutional "because one who engages in inter-State commerce thereby submits all his business concerns to the regulating power of Congress." "To state the proposition is to refute it. . . . If the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which from the beginning have been, and must continue to be, under their control so long as the Constitution endures." It is, however, proper to explain that the main point of this judgment was that the Act of Congress with which it was concerned appeared in terms to be applicable to the employees of inter-State carriers, not only when they were actually running trains from one State to another, but also when they were engaged in business which had no direct and conspicuous inter-State character, such as work in a repair-shop or in a warehouse. When Congress afterwards passed an Employers' Liability Act expressly limited to inter-State commerce, the Supreme Court upheld it.[1]

In 1917, in the case of Wilson *v.* New, the Supreme Court had to consider a Federal Statute, known as the Adamson Act, which had been passed in September 1916 in consequence of the threat of a general strike of all railroad employees throughout the United States. The Act was entitled, "An Act to establish an eight-hour day for employees engaged in Inter-State and Foreign Commerce and for other purposes." But since it provided that during a prescribed period after the passing of the Act wages should not be diminished below the then existing standard rate, it could not be denied that it was in effect not only an act for the regulation of hours, but also an act for the regulation

[1] In 1912; Willis, p. 351.

of wages, and this the Court felt to present greater difficulty than the fact that it controlled hours of labour. Nevertheless the Act was held to be constitutional, largely on the ground that it was an appropriate measure for meeting a national emergency.

Congress, said Chief Justice White, had to deal with "a dispute between the employers and employees as to a standard of wages, their failure to agree, the resulting absence of such standard, the entire interruption of inter-State commerce which was threatened, and the infinite injury to the public interest which was imminent." It was contended for the respondents that emergency cannot be a source of power; but that "proposition begs the question, since although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exercise of a living power already enjoyed." Conceding that Congress has by this Statute purported to regulate wages, that only shows "the nature and character of the regulation essential to protect the public right and safeguard the movement of inter-State commerce."

In the following year, in 1918, the Supreme Court had before it a case on the Commerce Clause which still holds a conspicuous place in public controversy. This was the case of Hammer *v.* Dagenhart (1918) (the first Child Labour case), in which the Court condemned as unconstitutional an Act passed by Congress two years before to prohibit the transportation in inter-State commerce of goods made at a factory in which children under fourteen were employed at all, or in which children under sixteen were employed for more than a restricted number of hours.

You will appreciate that in passing this Act Congress was endeavouring to apply the policy of denying the right of inter-State transportation to goods the trade in which it considered to be prejudicial to the public interest. This policy, as you will remember, had been approved in the case of Champion *v.* Ames (the Lottery case), and frequently acted on.

But the Court held that "the grant of power to Congress over the subject of inter-State commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture." The principle of Champion *v.* Ames was inapplicable, because the products of child labour are in themselves harmless.

And it is vain to argue, said the judgment, that since some States have restrained the employment of child labour more rigorously than others, the Act is legitimate because it prevents the unfair competition thus engendered, because the Commerce Clause was not intended to give Congress a general authority to redress the economic advantages which one State, by reason of its local laws or conditions, may have over another.

It has been pointed out that the result of this case is that neither the United States, nor the States, can effectively regulate child labour.[1]

In the recent case of the Railroad Retirement Board *v.* Alton (1935) the Court condemned, as exceeding the powers given by the Commerce Clause, the Railroad Retirement Act, 1934, which established a compulsory retirement and pension scheme for all persons employed in inter-State carriage by rail. Mr. Justice Roberts, speaking for the majority of the Court, said, "We feel bound to hold that a pension plan thus imposed is in no proper sense a regulation of the activity of inter-State transportation. It is an attempt for social ends to impose by sheer fiat non-contractual incidents upon the relation of employer and employee, not as rule or regulation of commerce between the States, but as a means of assuring a particular class of employees against old age dependency."[2]

[1] Willis, p. 341.

[2] The minority, composed of Chief Justice Hughes, and Justices Brandeis, Stone, and Cardozo, while agreeing with the majority that certain features of the Act were unconstitutional, dissented from the view that it was beyond the powers of Congress to pass a general pension law for railroad employees.

I am now going to pass on to the second of the two general questions which, as I have said, are raised by the Commerce Clause. This is the question "What degree of liberty in respect of inter-State commerce does the Clause leave to the States?" That question Marshall did not discuss in Gibbons *v.* Ogden, because in his view, in the circumstances of that case, Congress had completely occupied the field. Where Congress had exercised its constitutional power of regulation, any original prerogative which might have belonged to the State of New York was necessarily annihilated in so far as it had been applied in such a way as to conflict with the dispositions of Congress. But this by no means disposed of the question, what may be the powers possessed by the States in respect of inter-State commerce where there is no implacable conflict between what the State has done, or wishes to do, and what Congress has done.

Let me first state, in three bald propositions, what I conceive to be the view on this subject at the present time.[1]

The first proposition is that: where a subject is national in scope, the Federal power is exclusive, and not the less exclusive because it has not in fact been exercised.

The second proposition is that: the exclusive character of federal authority over subjects which are national in scope does not go to the length of wholly annihilating the police power of the States in proper cases.

And the third proposition is that: even where the State would prima facie have a free hand, either because the subject is not national in scope, or because of the State police power, the authority of Congress is nevertheless predominant, if constitutionally exercised.

The only true conflicts that can arise are over the application of these rules, and particularly where it is claimed that the power exercised by Congress is not constitutional, precisely because it conflicts with a proper exercise of the State police power. "The Supreme Court will sometimes

[1] Willis, pp. 307 ff.

balance the States' general police power against the Federal Government's specific police power and favour the one which it thinks the more important."[1] In other words, here as elsewhere the police power is a solvent of inconvenient doctrines.

These principles have only been slowly developed in the hundred years and more which have elapsed since the decision of Gibbons *v.* Ogden.

The distinction between subjects of national scope and subjects of purely local concern was first given prominence in the case of Cooley *v.* the Board of Wardens of the Port of Philadelphia, decided by the Supreme Court in 1851. A Pennsylvania Statute required the masters of ships arriving at or leaving the port of Philadelphia to employ a pilot. The validity of this law was disputed on the ground that it was repugnant to the Commerce Clause. Mr. Justice Curtis, speaking for the majority of the Court, said that in their opinion a regulation of pilots is a regulation of commerce within the grant to Congress of the commercial power. But that does not necessarily exclude the existence of a concurrent power in the State legislature. That question depends partly upon the subject-matter, and partly upon the question whether Congress has thought it necessary to exercise its indisputably predominant power. "Whatever subjects of the [commerce power] are in their nature national, or admit of only one uniform system, or place of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." In the instant case, however, that principle did not apply; the regulation of pilots in a particular port was a sufficiently local concern to be within the domain of the State legislature so long as Congress had not pre-empted the field. The principle here expounded has been called the "doctrine of selective exclusiveness."[2]

This doctrine was presented in a somewhat different guise

[1] Willis, pp. 309, 328.
[2] Frankfurter, *The Commerce Clause*, p. 56.

in the interesting case of Hall *v.* De Cuir, decided in 1878. A Louisiana Statute forbade common carriers discriminating between their passengers on the ground of their colour. Mrs. De Cuir, a coloured woman, having been refused accommodation in the cabin set apart for white people in a steamboat plying between ports in different States on the Mississippi river, brought an action under the Statute against the captain. On appeal to the Supreme Court, the Louisiana Statute was held to be unconstitutional. It is impossible, said Chief Justice Waite, in effect, for steamboats carrying through traffic between ten different States to be subject to passenger regulations which vary from State to State. This is a matter for Federal regulation, if any; "and this power of regulation may be exercised without legislation as well as with it." "By refraining from action, Congress, in effect, adopts as its own regulations those which the common law (or the civil law, where that prevails) has provided for the government of such business." In other words, in a subject which is national in scope, inaction by Congress does not let in a State power, but excludes it, by implicitly affirming the common law.

Meanwhile, a year earlier, the Court had embarked upon what proved to be a somewhat hesitating course of policy in regard to the right of the States to regulate railroad rates. After the Civil War, and in the early '70's, a movement had sprung up among the farming communities of the West which was known as the Granger movement, and which was largely a protest against the oppressive policies of the railways. This movement resulted in the passing of State laws in Illinois, Wisconsin, Iowa and Minnesota fixing maximum rates for passengers and freights on all railroads operating in those States. The validity of these Statutes was contested before the Supreme Court, in a group of cases known as the Granger cases. Of these cases that of Peik *v.* Chicago and North-Western R.R. (1877) may be taken as typical. In this case the State of Wisconsin had prescribed the maximum freights for the carriage of goods from one

point to another within the State, or between a point within the State to or from a point outside. The Statutes were upheld.[1] But nine years later, in the leading case of the Wabash, St. Louis and Pacific Railway Co. *v.* Illinois (1886) the Supreme Court reversed the Granger decisions in so far as they ratified State regulation of railway freights for transportation, part of which was to be effected outside the State boundary. In the language of Mr. Justice Miller, who gave the leading judgment, and who had been one of the majority in the Granger cases: "We must hold . . . that it is not, and never has been, the deliberate opinion of a majority of this Court that a Statute of a State which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the States, is a valid law."

It was in the following year, in 1887, and largely as a consequence of the agitation attending the decision in the Wabash case,[2] that Congress set its hand to the plough, and passed the Inter-State Commerce Act, which provided, somewhat ineffectively at first, for the control of inter-State carriage by railroad by a Federal Commission known as the Inter-State Commerce Commission, a body which, under successive amendments of the original Statute, has now acquired very great powers of regulation.

The question when a subject is to be held to be national in scope so as to vest in Congress the exclusive power to regulate it, is not an easy one. The case of the Louisiana law and the Mississippi steamboat shows that the expression "national in scope" must not be restricted to mean subjects which are of equal importance in all parts of the country. It would seem to mean rather a subject which cannot be satisfactorily dealt with by one or more States acting

[1] These railroad freight cases were decided on 1 March 1877, on the same day as that on which the decision in Munn *v.* Illinois was given. This case will be discussed in connexion with the 14th Amendment; see p. 103.

[2] Mark Sullivan, *Our Times*, III, p. 199.

severally. But if this meaning is correct, it reduces the proposition that Congress has exclusive power in subjects which are national in scope to little more than a tautology —or, in more benevolent terms, to yet another occasion for the exercise of the wisdom of the Supreme Court. And a tendency can perhaps be discerned, in some of the cases, to determine the question whether a State has trespassed upon the domain reserved for national regulation by a simple reference to the intrinsic propriety of the State's action.[1]

I will now briefly illustrate my second proposition, which is that the States will sometimes be authorized to legislate in the field of inter-State commerce under the ægis of the police power.

In Sherlock *v.* Alling, decided in 1876, an Indiana Statute gave a right of action to the personal representative of a person killed by the wrongful act or omission of another. Alling was the administrator of the estate of a person who had met his death, as it was alleged, by the negligence of the defendants' servants in the collision of the defendants' steamboat, while the steamboat was navigating the river Ohio within the territorial limits of Indiana. It was contended for the defendants that the Statute of Indiana created a new liability which could not "be applied to cases where the injuries complained of were caused by marine torts, without interfering with the exclusive regulation of commerce vested in Congress." Mr. Justice Field, in a judgment upholding the application of the Statute, said: "In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." It would be perfectly open to Congress to legislate as to the liabilities arising from marine torts resulting in the death of the persons injured; but until it has done so, the State legislatures are not silenced. In

[1] Cf. Judgment of Chief Justice Fuller in Leisy *v.* Hardin (1890).

the case of Railroad Co. *v.* Fuller, in 1873, the Court had to consider an Iowa Statute which required all railways operating in the State to fix and publish their rates annually and to adhere to their published rates under penalty. Since this regulation applied to railroads engaged in inter-State commerce it was contended that it conflicted with the Commerce Clause. But the Supreme Court held that it did not, on the ground that it was a police regulation. Mr. Justice Swayne, giving the judgment of the Court in this case, showed a distinct disposition to say that the Iowa Statute was *not* a regulation of inter-State commerce *because* it was a legitimate police regulation, which is somewhat difficult to reconcile with the classification I have put before you. But I think, with great respect, that it was plainly both the one and the other.

In Plumley *v.* Massachusetts (1894) the Supreme Court upheld a Massachusetts Statute which prohibited the importation into the State of margarine coloured to look like butter, on the ground that it was a legitimate exercise of the police power. The difficulty of the problems presented to the Court by the task of defining the police power is illustrated by the fact that in this case Chief Justice Fuller, supported by two of the Associate Justices, denied "that a State may exclude from commerce legitimate subjects of commercial dealings because of the possibility that their appearance may deceive purchasers in regard to their qualities."

Some more modern illustrations of the social control of inter-State commerce permitted to the States under their general police power will show the extent to which the States are now permitted to go.[1] They may, for example, require motor carriers engaged in inter-State commerce to take out operators' permits, and to be insured against liability to third persons; they may require railroads to build a union passenger station; they may require the building of bridges or subways for the safety of the public:

[1] Willis, pp. 328 ff.

and they may regulate the length and weight of motor trucks and the weight of the loads which they may carry.

An interesting question to which I may refer in conclusion is whether, in matters of commerce, Congress can delegate any part of its regulative power to the States.[1] In Leisy *v.* Hardin (1890) the Supreme Court held an Iowa Statute to be invalid which prohibited the importation of alcoholic liquor into the State, even in its original containers. Very shortly after this decision, on 8 August 1890, Congress, by the so-called "Wilson Act" empowered the States who wanted to do so, that is to say, the dry States, to exercise police power over liquor imported from other States, even when sold in their original packages. On the following day, 9 August, one Rahrer, a citizen of Missouri, was arrested in Kansas under the State law for selling liquor imported from Missouri. It was contended on Rahrer's behalf that the only power Congress possessed to amplify the power of the States, was the power expressly given under Section 10 of Article 1 of the Constitution, under which, with the consent of Congress, and not otherwise, the States may lay duties on exports, imports, make agreements with other States, keep ships of war in time of peace and do various other improbable things. In particular, it was argued, the Congress could not delegate to the States any part of its power to regulate inter-State commerce. This attractive argument was unsuccessful, Chief Justice Fuller maintaining, in what I venture to think was a somewhat unconvincing judgment, that there had been no delegation. The Act, he said, in effect, did not give the State a new power, but merely removed a previously existing obstacle.[2] But the obstacle, according to Leisy *v.* Hardin, was a constitutional obstacle. As Professor Willis has observed, if Congress can delegate any of its powers, it can delegate all of them, and so put an end to the Federal Government.[3]

Before I conclude this lecture I will call your attention to two cases in which State legislation which might appear

[1] Willis, p. 300. [2] In *re* Rahrer (1891). [3] Willis, loc. cit.

to trespass on the territory reserved to Congress has nevertheless been upheld as valid, not on the ground that it constituted a legitimate exercise of the police power, but on the ground that, in spite of appearances, it did not regulate commerce.

In Paul *v.* Virginia (1869) a Virginia Statute prohibited foreign insurance companies, that is to say, *inter alia*, companies incorporated in other States, and their agents, from doing business in Virginia except under licence. Paul, the appellant, who was the agent of a New York Fire Insurance Company, had been convicted under this Statute, and it was contended on his behalf, before the Supreme Court, that the Virginia Act was *ultra vires* because it purported to regulate inter-State commerce in a manner not competent for a State. The Court, by Mr. Justice Field, rejected this argument on the ground that "the issuing of a policy of insurance is not a transaction of commerce." . . . Policies "are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them . . . they are local transactions and are governed by the local law."

In Pullman's Palace Car Co. *v.* Pennsylvania (1891) the appellant was a company incorporated in the State of Illinois, which supplied sleeping-cars for use on the railways in different parts of the United States. It had about 100 cars in service in Pennsylvania; and in respect of those cars it had been subject to a Pennsylvania property tax on its capital stock, calculated on the basis of the proportion between the mileage run in Pennsylvania and the total mileage run by the cars of the Company. The Supreme Court held that this was not a tax on inter-State commerce, but a tax on property found in the State of Pennsylvania, on the same basis as any other property found there, with no differentiation against the inter-State user.

I should like to finish this lecture with a lapidary phrase, which would put the whole law of the Commerce Clause in a nutshell. But I fear that the subject is rebellious to such a

synthesis, and that I must renounce the attempt to reduce to a single formula the clash of two sovereignties, modified by the competition of two police powers, conflicting in a field which is sometimes predominantly national and sometimes predominantly local in scope.

LECTURE IV

THE CONTRACT CLAUSE

IN my last lecture I was talking about the distribution of legislative powers between the Federal Government and the States, with illustrations taken chiefly from cases under the Commerce Clause.

I am now going to talk about those constitutional limitations, or some of them, the object and effect of which is, not to preserve the dual form of government, the independent sovereignties of the States and the Union, but to protect the rights of individuals and private corporations against the encroachments of the legislative power, whether Federal or State. But I ought to warn you that I am endeavouring to give a specious appearance of simplicity to a very complex subject. It is in reality somewhat deceptive to represent the limitations of the Constitution as being neatly divisible into those the object of which is to preserve the general framework of the government, and those the object of which is to preserve individual or corporate rights. Actions can hardly ever be brought except for the purpose of vindicating private or corporate rights. But a litigant who wishes to argue that a certain law, whether a Federal law, or a State law, is unconstitutional, will not confine his argument to the clauses in the Constitution which seem to be specifically intended for the protection of the individual citizen; he will not hesitate to invoke clauses which were intended to preserve the boundary between the powers of Congress and the powers of the States, or between the powers of Congress and the powers of the President; and he is quite as likely to win his case on what I may call a

public clause as on what I may call a private clause. I should, for example, call the Commerce Clause a public clause, because it gives wide power to Congress which would otherwise have remained with the States. But all the cases I cited to you in my last lecture in illustration of the Commerce Clause were cases in which private rights were at issue.

But after this warning I shall adhere to my distinction, and proceed to talk about the private clauses.

For practical purposes, at the present day, the most important restriction imposed by the Constitution upon Congress in the interest of the private citizen is the provision in the 5th Amendment to the effect that no person shall be deprived of life, liberty, or property without due process of law.[1] And the most important restrictions, of the same intent, imposed upon the power of the States are the provision in the 10th Section of the 1st Article that no State shall pass any law impairing the obligation of contracts; and the provisions of the 14th Amendment, which forbid any State to "abridge the privileges or immunities of citizens of the United States"; to "deprive any person of life, liberty, or property, without due process of law"; or "to deny to any person within its jurisdiction the equal protection of the laws."

"Due Process of Law," and the 14th Amendment, I shall for the present postpone. In this lecture I am going to talk about the Contract Clause, which, as you will remember, applies only to the States; but is not for that reason any the less important. The reasons which prompted the insertion in the Constitution of the Contract Clause were rehearsed by Chief Justice Marshall in his judgment in Ogden *v.* Saunders (1827). "The power of changing the relative situation of debtor and creditor, of interfering with

[1] The perils of simplification are illustrated by the fact that, as will appear later, the Due Process Clause of the 5th Amendment has been expanded by interpretation to extend to Congress a prohibition on legislation impairing the obligation of contracts.

contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the State legislatures, as to break in upon the ordinary intercourse of society and destroy all confidence between man and man. This mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith. To guard against a continuance of the evil . . . was one of the important benefits expected from a reform of the government."

The Contract Clause raises two questions. What is a contract? And when is the obligation of a contract impaired?

What is a Contract?

You might not unnaturally suppose that you knew what a contract is. If you are a lawyer, you will think that you learned so much at the beginning of your studies from Pollock, Salmond, and Anson. But if you apply such jejune ideas to the interpretation of the Contract Clause of the American Constitution, you will soon find that you have gone astray. For the purposes of the Constitution a contract is whatever the Supreme Court says it is; and the Supreme Court, on this subject, has taken a liberal view.

The first case to come before the Court involving the interpretation of the Contract Clause was the case of Fletcher *v.* Peck, decided by Chief Justice Marshall in 1810. This was also the first case in which the Court held a State Statute to be invalid. These were the facts. In the year 1795 the legislature of the State of Georgia, having been bribed and corrupted, passed an act authorizing the Governor to convey great tracts of western land to four land companies. This transaction provoked vehement expressions of popular disapproval, and the Act was, in consequence, repealed in the following year, by a Statute which purported to annul everything done under the previous law,

and to reassert the title of the State. Meanwhile there had been extensive dealings in the lands in question, and the equivocation of the State legislature had created much doubt as to titles. Peck, who claimed title to certain properties under the original Act, conveyed his holding to Fletcher, with covenants of title; and Fletcher brought suit for the breach of these covenants, consisting in the rescinding Act.[1] Marshall gave judgment for Peck, the vendor, on the ground that the repealing Act of the Georgia legislature was void, and that Fletcher consequently had a good title. The repealing Act was invalid because it purported to rescind a grant; and a grant, though it be an executed and not an executory contract, is nevertheless a contract; in any case it implies an obligation of the grantor not to reassert the rights which he has conveyed. "It would be strange," said the Chief Justice, "if a contract to convey was secured by the Constitution while an absolute conveyance remained unprotected."

Nine years later, in 1819, the Chief Justice decided one of the most famous cases ever brought before a court of law; this was the case of Dartmouth College *v.* Woodward. About the year 1750 a missionary school for Indians was founded by one Eleazer Wheelock (1711–79)[2] at Lebanon, Connecticut. In 1765 one Samson Occam, an Indian preacher and a former student of the school, visited England and Scotland to raise funds for the institution and was successful in raising a sum of over £11,000. The Earl of Dartmouth was president of the trustees of the funds raised in Great Britain, and hence the name which the college presently assumed. In consequence of this success it was decided to enlarge the character of the institution and to move it to Hanover, New Hampshire; and in 1769 the school was incorporated as a college by a charter granted by John Wentworth, Governor of New Hampshire, in the name of King George III. The government of the college

[1] The suit was almost certainly collusive. Beveridge, *Life of Marshall*, Vol. III, p. 585.

[2] Cf., Beveridge, *Life of Marshall*, Vol. IV, pp. 223 ff. Also *Encyclopædia Britannica*, 13th ed., sub. tit. Dartmouth College.

was vested in Wheelock, as first president, and in twelve trustees. Wheelock was given power to nominate his successor by will, and the trustees, or a majority of them, were authorized to remove and appoint future presidents and to fill vacancies in their own number by co-optation. At Wheelock's death in 1779 his son, John Wheelock, succeeded him in the presidency. Four years later a first-class row began to develop. That it was a dignified, or at any rate a sedate row, is suggested by the fact that it was not until forty years had elapsed from Wheelock's inauguration that the conflict had reached a stage which brought it before the Supreme Court.

The substance of the row was that John Wheelock was a Presbyterian and a Federalist, whereas, in course of time, it came about that the majority of the trustees were Congregationalists and Republicans. In 1815 the trustees removed Wheelock from the presidency, and appointed one Dr. Francis Brown in his place. A Republican State legislature came to their support, and passed an Act changing the name of Dartmouth College to Dartmouth University, increasing the number of trustees from twelve to twenty-one, providing for a board of twenty-five overseers with power to veto the acts of the trustees, and giving to the Governor of the State and his Council the power to appoint both overseers and trustees. The effect of this Act was, of course, to annul the charter and to bring the college under the control of the State legislature. The new authorities proceeded to expel and to replace the old; and to make things more difficult for historians, Wheelock, and Woodward, the secretary to the original trustees, went over to the enemy and became respectively president and secretary of the University, while Dr. Francis Brown, the original symbol of revolt, stood by the charter and the old college. Finally the dispossessed trustees of the old college brought an action of trover against Woodward to recover possession of the records, the original charter, and the corporate seal.

In the course of his judgment, Marshall said, "It can

require no argument to prove that the circumstances of this case constitute a contract. An application is made to the Crown to incorporate a religious and literary institution. In the application, it is stated that large contributions have been made for the object, which will be conferred on the corporation as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely in this transaction every ingredient of a complete and legitimate contract is to be found." The Chief Justice went on to say that the protection of the Contract Clause did not extend to charters of a definitely political character. "If the act of incorporation be a grant of political power, if it creates a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transaction, the subject is one in which the legislature may act according to its own judgment, unrestrained" by the Constitution of the United States. But Dartmouth College is not a public institution in any of these senses. And the action of the New Hampshire legislature, in substituting the will of the State for the will of the founders, has evidently impaired the rights conferred by the charter upon the trustees.[1]

The far-reaching importance of this decision lay in the fact that it established the principle that, at any rate, as a principle, the legislatures of the States have no power to revoke or to amend a charter once granted, if its object is anything else than the creation of a political or administrative body, such as a municipal corporation; and that the wide class of bodies thus protected from legislative attack or control includes not only charities, like the Dartmouth College, but all incorporated commercial companies, such as banks and railroads. The consequence has been that the

[1] It is interesting to record that in consequence of this judgment Dartmouth College, now a very flourishing institution, is still governed by its original charter. Under a "gentleman's agreement," however, five of the twelve trustees are in fact elected by the graduates.

history of the Contract Clause since the Dartmouth College decision has been in part the history of the unchecked licence of chartered corporations, and in part also the history of the measures resorted to by the legislatures, and the doctrines adopted by the Supreme Court, with a view to limiting or evading its application.[1] It should, however, be said that even writers who are keenly alive to the evil results of Marshall's decision are ready to recognize that the security he gave to corporations has had its good side, and has been a powerful factor in the rapid economic development of the country.[2]

An obvious method of avoiding the extreme consequences of the Dartmouth College judgment was for the legislatures, when granting charters, to reserve rights of repeal and revision; and this course was often followed. Massachusetts in 1831 passed a general act providing that "every act of incorporation passed after the 11th day of March, 1831, shall be subject to amendment, alteration, or repeal, at the pleasure of the legislature."[3] But the practice of reserving the right of control in this way was far from universal; promoters did not like it, and they often knew how to make their dislike effective; and the extent to which it was constitutionally valid was not free from doubt.[4]

Much more effective have been two doctrines developed by the Supreme Court; one, that grants or charters must be strictly interpreted; the other that there are certain contracts which a State cannot lawfully make.

The leading case on the strict construction principle is the case of The Proprietors of the Charles River Bridge *v.* The Proprietors of the Warren Bridge, decided by the Supreme Court in 1837.[5]

[1] Cf., Willis, pp. 611 ff.
[2] Greenwood *v.* Marginal Freight Co. (1881).
[3] Willis, ibid.
[4] Willis, p. 615.
[5] The judgment in this case was the first judgment of any importance given by Chief Justice Taney. Taney was a prominent member of the party which, under several successive names, has (until recently) stood for States' rights; and his first decision after the death of his predecessor, Marshall, the Federalist, is therefore symbolic.

In 1650 the legislature of Massachusetts had granted to Harvard College the right to dispose of a ferry across the Charles River, which, I may inform you, divides Cambridge from Boston. The College enjoyed the proceeds of the ferry until 1785, in which year the legislature incorporated the "Proprietors of the Charles River Bridge" for the purpose of erecting a bridge in the place of the ferry. The Company was to receive tolls, and to pay two hundred pounds annually to the College. The charter, subsequently extended, was to run until 1856. In 1828 the legislature incorporated a rival company, "The Proprietors of the Warren Bridge," for the purpose of erecting another bridge, close to the former one. The new bridge was, in a very few years, to be toll-free, and was consequently destined to be a disastrous competitor to the old bridge. The older company preferred a bill in equity for an injunction to prevent the building of the new bridge. Having lost in the Supreme Judicial Court of Massachusetts, the petitioners brought their case by writ of error before the Supreme Court, where the decree of the State Court was affirmed, and the promoters of the new bridge were authorized to proceed with the work. The question to be decided was whether the charter to the Charles River Bridge contained a grant of a monopoly. It certainly did not do so in express terms; nor, assuming that the Harvard ferry which it replaced had a monopoly, was there any sufficient ground for holding that the Charles River Bridge Company had inherited the rights of the College. "It is a rule well settled in England," said the Chief Justice, "and equally applicable in America, that in construing public grants any ambiguity 'must operate against the adventurers and in favour of the public.'" The Court held, Mr. Justice Story dissenting, that the proprietors of the Charles River Bridge had no monopoly. Both Story and Daniel Webster (who had been Counsel for the old Bridge Company) regarded this decision as a reversal of the Dartmouth College case; and Webster went so far as to say that it had "completely reversed a clear

provision of the Constitution": but he was exaggerating; it had only drawn some of its teeth.

A more powerful principle than the principle of strict construction is the doctrine that there are contracts which a State cannot lawfully make. In particular, a State cannot bargain away either its police power, or its power of eminent domain, which means to say its power, subject to compensation, of taking property for the public use.

That a State cannot give away by charter its right of eminent domain was decided in 1848, in another bridge case, West River Bridge Co. *v.* Dix. The Company had been incorporated in 1785 by the legislature of the State of Vermont, and invested with a franchise to build a bridge over the West River, and to collect tolls for a term of one hundred years. In 1839 the legislature passed a general Act by which power was given to the Supreme and County Courts of the State "to take any real estate, easement, or franchise of any turnpike or other corporation, when in their judgment the public good requires a public highway," and to pay compensation. Under the authority of this Act the West River Bridge was made part of a public highway. The Supreme Court declined to regard the action of the State as an infringement of the Contract Clause. The franchise of a corporation is not more sacred than the property rights of private individuals. Both are necessarily subject to the power of eminent domain, that is to the inalienable right and duty of the State "to guard its own existence, and to protect and promote the interests and welfare of the community at large." The resumption by the State of Vermont of the franchise granted to the Bridge Company does not violate any contract, because no such contract as is claimed does or can exist. Mr. Justice Daniel, whose judgment I have summarized, does not refer to the "police power," perhaps because in 1848 that expression was not so current as it afterwards became; but the virtue which he ascribes to the power of "eminent domain" would seem to be sufficiently ample to justify all the results

afterwards obtained by reliance upon the more modern and apparently more comprehensive term.

The first notable case[1] in which the Supreme Court made use of the doctrine of the inalienability of the police power for the purpose of limiting the principle of the Dartmouth College case was the case of Stone *v.* Mississippi, decided in 1879. In 1867 the legislature of the State of Mississippi had incorporated "the Mississippi Agricultural, Educational, and Manufacturing Aid Society," for the purpose of conducting lotteries, from which the State was to benefit. Two years later the State adopted a new constitution, by which the legislature was forbidden ever to authorize a lottery; and in 1870 the State legislature passed an Act making it unlawful to conduct a lottery. The Agricultural, Educational, and Manufacturing Aid Society took proceedings to defend its franchise, and eventually reached the Supreme Court. Chief Justice Waite said: "All agree that the legislature cannot bargain away the police power of a State. Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police. Many attempts have been made in this Court and elsewhere to define the police power, but never with entire success. . . . No one denies, however, that it extends to all matters affecting the public health or the public morals. Neither can it be denied that lotteries are proper subjects for the exercise of this power. . . . The contracts which the Constitution protects are those which relate to property rights, not governmental. It is not always easy to tell on which side of the line which separates governmental from property rights a particular case is to be put on; but in respect to

[1] Stone *v.* Mississipi is the case commonly cited as the leading case on this subject; but it was certainly not the first case in which the doctrine of the police power was referred to as solvent of the Dartmouth College doctrine. Cf. Fertilizing Co. *v.* Hyde Park (1878).

lotteries there can be no difficulty. . . . Certainly the right to suppress them is governmental, to be exercised at all times by those in power, at their discretion."

And three years later, in the Butchers' Union *v.* the Crescent City Slaughter House Co. (1883), Mr. Justice Miller, speaking for the Court, said that while it had been decided[1] that it was lawful for a legislature to create a monopoly, this did not mean that a legislature could deprive itself of its police power to terminate a monopoly previously granted.

An interesting case on the alienation of inalienable rights of sovereignty is Illinois Central R.R. Co. *v.* Illinois, decided in 1892. In 1869 the legislature of the State of Illinois had granted to the Illinois Central R.R. Co. the fee simple of more than a thousand acres of land submerged under the waters of Lake Michigan (on the shores of which stands the City of Chicago), the grant including the harbour of the City and a large area besides. The limitations to the absolute character of the grant were unimportant, or easy to circumvent. Four years later, in 1873—the great fire having taken place in the interval—the State legislature repealed the Act and the grant. Nearly twenty years elapsed before the validity of this repeal came for determination before the Supreme Court; and the Supreme Court, by the mouth of Mr. Justice Field, held that the grant was bad, and that the repeal was good. "The question to be considered," he said, "was whether the legislature was competent thus to deprive the State of its ownership of the submerged lands in the harbour of Chicago, and of the consequent control of its waters; or, in other words whether the railroad corporation can hold the lands and control the waters by the grant, against any future exercise of power over them by the State." . . . The title of the State "is different in character from that which the State holds in lands intended for sale. . . . It is a title held in trust for the people of the State"; and such a trust cannot be defeated by a transfer of the

[1] In the Slaughter-house Cases (1873).

title. "Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time." "There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it."

A case of this kind makes it easy to understand the importance attached by Americans to the control exercised by the Supreme Court over the acts of legislative bodies.

I must now say a few words about some marginal cases, in which the Supreme Court has had to decide, there being room for doubt, whether or no an apparent agreement entered into by a State was a Contract within the meaning of the Contract Clause.

In American Smelting and Refining Co. *v.* Colorado, the Supreme Court held in 1907 that a licence to do business in the State is a contract the obligation of which must not be impaired. The Smelting Company, a New Jersey Corporation, applied in 1899 for permission to do business in Colorado, and having satisfied all the requirements of the State laws then in force, proceeded to invest five million dollars in erecting a plant in Colorado. In 1902 the legislature passed a taxing Act under which every domestic corporation was to pay an annual licence tax at the rate of two cents for every thousand dollars of its capital stock, while foreign corporations were to pay an annual tax at the double rate of four cents. The Smelting Company, since it was incorporated in New Jersey, was, in the language of American law, a foreign corporation. It refused to pay, and proceedings in the nature of *quo warranto* were taken against it by the State authorities. The Supreme Court held that the fact that the Smelting Co. had been licensed to do business in Colorado without any express reservation of the power to tax it at a higher rate than domestic corporations, implied a contract not to do so.

But a law authorizing private persons to bring suits

against a State does not give rise to contractual rights. The Constitution of the State of Arkansas permitted suits to be brought against the State in its own Courts: and in November, 1854, one Beers brought an action against the State to recover interest on State bonds. In the following month the legislature passed an Act providing that in every case in which suit had been instituted against the State for principal or interest on State bonds, the bonds must be filed in the office of the Clerk, and if this were not done the Court should dismiss the suit. Beers was apparently unable to file his bonds; at any rate he did not do so, and his suit was accordingly dismissed. In the Supreme Court Chief Justice Taney held that the consent of the State to submit to suit was a purely voluntary concession, that it created no contract, and that the State remained free at any time to withdraw the right, or to impose conditions upon its exercise.[1]

And the appointment of a public official is not a contract within the protection of the Contract Clause. In February 1843, the Governor of Pennsylvania appointed one Butler to be a Canal Commissioner for the term of one year at the salary (fixed by the then existing law) of $4 a day. Two months later the legislature reduced the salary to $3 a day. Butler contended that this act was unconstitutional, and carried his complaint to the Supreme Court, where Mr. Justice Daniel, giving judgment, said that the regulation of the salary affixed to an office created for the public use does not come within the term "contracts," "or in other words, the vested private personal rights thereby intended to be protected."[2]

I have so far been speaking of contracts, or alleged contracts, made by States. I must now say a few words about

[1] Beers *v.* Arkansas (1857).

[2] Butler *v.* Pennsylvania (1851). The tenor of the judgment suggests that the Court was feeling its way towards the doctrine of the reserved police power.

agreements, or alleged agreements, of a less exalted character.

It has been held that marriage is not a contract, so as to render a private divorce Act unconstitutional.[1]

And a judgment is not a contract. One Morley obtained a judgment in the New York Court against the Lake Shore and Michigan Southern Railway Company. At the time the judgment was given, the statutory rate of interest on unsatisfied judgments was seven per cent. Shortly afterwards the New York legislature reduced the rate of interest to six per cent. Morley disputed the constitutionality of this Act, which, his judgment not having been satisfied, reduced the amount he was entitled to claim by way of interest. The Supreme Court held that since the claim to interest did not arise from the agreement of the parties but purely from a Statute it was not a contract, for mutual assent is of the very essence of a contract. "Where the transaction is not based upon any assent of the parties it cannot be said that any faith is pledged with respect to it, and no case arises for the operation of the constitutional prohibition."[2]

But where there is a contract, the provisions of a law in force at the time it was entered into may be imported into it. In Van Hoffman *v.* the City of Quincy (1866) the city had issued bonds for railroad purposes; and under the Illinois legislation in force at the time the City was authorized to collect a special annual tax sufficient in amount to pay the interest, and earmarked for that purpose. Subsequently the State legislature repealed the Acts in question, and prohibited the City from exceeding a certain maximum tax-rate —a rate which was insufficient to realize more than the amount necessary to meet the City's current expenses. Van Hoffman, a bondholder, successfully contended that the repealing Act impaired the obligation of the city's contracts. The Court, in ordering a mandamus to issue, compared the special taxing power which the State had originally given

[1] Maynard *v.* Hill (1888).
[2] Morley *v.* Lake Shore, etc., R.R. Co. (1892).

to the City to a trust for the benefit of the bondholders. "The power given becomes a trust which the donor cannot annul and which the donee is bound to execute."

I have said that the application of the Contract Clause raises two questions: what is a contract? and when may the obligation of a contract be said to be impaired? I will now turn to the second question. The obligation of a contract is of course impaired when the contract, or a substantial term in the contract, is annulled or released. And so long ago as 1819 Chief Justice Marshall held, in the case of Sturges *v.* Crowninshield, that a New York bankruptcy Act passed on 3 April 1811 was no defence to an action on two promissory notes made twelve days earlier; and in Ogden *v.* Saunders (1827) it was held that a debtor cannot plead a State Statute for the relief of insolvent debtors passed previously to the creation of the debt, if the creditor is a citizen of a different State.

Let me digress for a moment to the subject of bankruptcy laws. Since the Contract Clause does not govern Acts of Congress, the two decisions I have just quoted would have no application if the debtor was able to plead discharge under a Federal Statute; and bankruptcy is a subject over which both the States and Congress have concurrent power; though anything done under a Federal Act will of course prevail over anything done under a State Act. But Congress has changed its mind several times as to the desirability of exercising its power to pass bankruptcy Acts of national application. A national bankruptcy Act was first passed in 1800 and repealed in 1803. A second Federal Act was passed in 1841 and repealed in 1843, and a third was passed in 1867 and repealed in 1878. But at present a national bankruptcy Act is in force which was passed in 1898.[1] In

[1] Magruder and Claire, *The Constitution*, p. 84. Professor Willis is of opinion that at the present day a retrospective bankruptcy law would, and should, be held valid as a proper exercise of the police power. (Willis, p. 622.)

this, as in other subjects, the forces working in favour of centralization seem to be gaining ground.

The obligation of a contract is not impaired by a law which affects the remedy for breach, but does not impair any substantial right secured by the contract. Though this principle is well settled, it has been criticized as lacking any comprehensible logical basis;[1] and it has led to a somewhat meandering line of decisions.

In Penniman's case, decided by the Supreme Court in 1881, one Tweedle, a creditor of a Rhode Island manufacturing corporation, had recovered a judgment against the company, at a time when the law of the State permitted execution to be had against the person or property of the shareholders on any writ of execution against the corporation. Penniman was a shareholder; and the Sheriff, seeking to execute Tweedle's judgment, and being unable to find any property belonging either to the company or to Penniman, arrested Penniman and put him in prison. While Penniman was still incarcerated, the State legislature repealed the law under which he had been arrested; and he petitioned the Court for his release. Tweedle objected that the new law impaired the obligation of his contract. But the Supreme Court refused to sustain this objection, on the ground that liability to imprisonment forms no part of the contract. "In modes of proceeding and forms to enforce the contract the legislature has the control, and may enlarge, limit, or alter them, provided it does not deny a remedy or so embarrass it with conditions or restrictions as seriously to impair the value of the right." "The abolition of imprisonment for debt is not of itself such a change in the remedy as impairs the obligation of the contract."

And a Statute of Limitation which abbreviates the time within which an existing right must be exercised is not unconstitutional provided it is not unreasonable.[2]

[1] See remarks of Swayne, J., in Van Hoffmann *v.* City of Quincy (1867).

[2] Terry *v.* Anderson (1877). But "a Statute of Limitation giving to the holders of tax-receivable coupons but a single year for the

And a law imposing a penalty for disputing a contractual liability is not unconstitutional. In the case of the Fraternal Mystic Circle *v.* Snyder (1913), one Snyder had insured his life, in 1887, with the corporation, and had died in 1908. In 1901 the legislature of Tennessee had passed an Act under which, if an insurance company should refuse to pay a loss, and it were proved that the refusal was not in good faith, the insurer should be liable to pay to the policy holder, in addition to the loss and the interest thereon, a sum not exceeding twenty-five per cent of the principal liability. Snyder's representative had recovered the maximum penalty under the Act; and the Fraternal Mystic Circle contended that the provision for added liability placed a burden upon the assertion of the rights which their contract reserved to them, and thus in effect changed the contract by allowing a recovery to which the parties had not agreed. Mr. Justice Hughes (as he then was), in sustaining the Act, said, "the State is entitled at all times to take proper measures to prevent the perversion of its legal machinery, and there was no denial or burdening, in any proper sense, of the existing remedies applicable to the contract by the demand that they be availed of *bona fide*."

On the other hand it was held in Gunn *v.* Barry (1873) that a Homestead Law impairs the obligation of a pre-existing contract. In 1866 Gunn had recovered judgment in a Georgia State Court against one Hart for $530. Two years later a clause in a new State Constitution provided that each head of a family should be entitled to a homestead of realty to the value of $2,000, and of personalty to the value of $1,000, and that no court or ministerial officer should ever have authority to enforce any judgment or execution against the property so set apart.

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presentation in payment of taxes of the coupons then in their possession is unreasonable and oppressive when all the bonds and coupons outstanding amount to such a considerable sum that it is not possible that they could be received within one year in payment of taxes." In re Brown (1889).

Hart had availed himself of this provision, and when Gunn, his creditor, tried to induce Barry, the Sheriff, to levy execution on Hart's homestead, Barry refused; whereupon Gunn petitioned for a mandamus to compel him to make the levy. The Supreme Court supported Gunn, saying that in this case the restrictions on the remedy amounted to an impairment of a substantial contractual right. The provision complained of withdrew the land from the lien of the judgment and thus destroyed a vested right of property which the creditor had acquired.

And in an earlier case the Court had condemned two Illinois Statutes for the relief of debtors, which provided that a mortgagor might redeem his property up to twelve months after its foreclosure and sale, and that no sale on foreclosure should be permitted for a less price than two-thirds of the value of the property as estimated by three householders. These Acts were held so to embarrass and restrict the mortgagee's remedies as to impair his substantial rights.[1]

But the Supreme Court has recently been led by the prevailing distress to take a more tolerant view of State legislation for the relief of mortgagors. The outstanding case is Home Building and Loan Association *v.* Blaisdell, known as the Minnesota Moratorium case, decided in 1934. Blaisdell had mortgaged his house in Minneapolis to the Loan Association, which had foreclosed. Under the law then in force the mortgagor's right to redeem expired one year later, on 2 May 1933. Shortly before this date the Minnesota legislature passed an Act authorizing the Courts, on the petition of a mortgagor, to extend the time allowed for redemption, but so that it should not be protracted to a later date than May 1935, and provided that during the extension the debtor should pay a reasonable sum by way of rent. Blaisdell took advantage of this Act, and procured an extension of time, which the Loan Association contested on the ground of the unconstitutionality of the Statute. In

[1] Bronson *v.* Kinzie (1843).

a long and elaborate judgment sustaining the Act, Chief Justice Hughes touched only lightly upon the control which the State retains over remedial processes, but laid great emphasis upon the police power. "With a growing recognition of public needs and the relation of individual right to public security, the Court has sought to prevent the perversion of the [Contract] Clause through its use as an instrument to throttle the capacity of the States to protect their fundamental interests." "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." In this case the Court agreed with the declaration of the Minnesota legislature that there was an emergency. And although "emergency does not create power" emergency "may afford a reason for the extension of a living power already enjoyed"—in other words, the police power. And while paying homage to the proprieties by professing not to be concerned with the question whether the policy of the Minnesota Statute was wise or unwise, the Court in effect said that it was at any rate sufficiently wise to pass muster and must be sustained. Two pertinent precedents were cited by the Chief Justice in the shape of decisions given shortly after the War sustaining New York Rent Restriction Acts, held to be justified by the public emergency created by a housing shortage.[1]

I shall conclude this lecture with some remarks about the power of a State to deprive itself by contract of a part of its taxing power. The Supreme Court has not extended to taxation the doctrine of the inalienability of the police power and of the power of Eminent Domain.[2] Indeed the

[1] Marcus Brown Holding Co. *v.* Feldman, (1920), and Edgar A. Levy Leasing Co. *v.* Siegel (1921). The Chief Justice also cited a decision sustaining a Federal Rent Restriction Act for the District of Columbia, contested under the Due Process Clause of the 5th Amendment.

[2] Willis, p. 620.

contrary doctrine has long been well established. In the case of The Home of the Friendless *v.* Rouse (1869), Mr. Justice Davis said, "the validity of this contract is questioned at the bar on the ground that the legislature had no authority to grant away the power of taxation. The answer to this position is that the question is no longer open to argument here, for it is settled by the repeated adjudications of this Court, that a State may, by a contract based upon a consideration, exempt the property of an individual or corporation from taxation, either for a specified period, or permanently. And it is equally well settled that the exemption is presumed to be on sufficient consideration, and binds the State if the charter containing it is accepted."

It has been suggested that the differentiation may be justified by the fact that "Taxation is for the purpose of providing the State a revenue, and the State laws which have been enforced as contracts in these cases have been supposed to be based upon consideration, by which the State receives the benefit which would have accrued from an exercise of the relinquished power in the ordinary mode."[1] But the plea is open to the objection that it is impossible for one legislature to anticipate the fiscal necessities of its successors.

In the curious and picturesque case of New Jersey *v.* Wilson, Chief Justice Marshall went so far as to decide, in 1812, that the benefit of a tax-free concession ran with the land. The facts were as follows. Long before the Revolution a part of the tribe of Delaware Indians had a claim to extensive lands in New Jersey, the extinction of which was desired by the Colonial Government. In 1758 a treaty was entered into between the Indians and the Colony to which effect was given by an Act of the Colonial Legislature, under which the Indians released their original claim, in consideration of the purchase and the conveyance to trustees on their behalf of other lands, which, we may suppose, were less

[1] Cooley, *Constitutional Limitations*, cited by Willis, loc. cit.

ardently desired by the settlers. The Act provided that the lands to be purchased for the Indians should not thereafter be subject to any tax. In 1801 the Indians, wishing to emigrate to the State of New York, applied for and obtained an Act of the New Jersey legislature authorizing a sale of their land in that State. In 1803 the Commissioners accordingly sold the lands in question to the plaintiff in this case, among others. And in 1804 the State legislature passed an Act repealing that section of the Act of 1758 which exempted the lands therein mentioned from taxes. The lands were then assessed, and taxes demanded. The case came to the Supreme Court, and the Chief Justice said that "every requisite to the formation of a contract is found in the proceedings between the then colony of New Jersey and the Indians. . . . The privilege, though for the benefit of the Indians, is annexed, by the terms which create it, to the land itself, not to their persons. . . . It is not doubted that the State of New Jersey might have insisted on a surrender of this principle as the sole condition on which a sale of the property should be allowed. But this condition has not been insisted on. The land has been sold, with the assent of the State, with all its privileges and immunities. The purchaser succeeds, with the assent of the State, to all the rights of the Indians. . . . This contract is certainly impaired by a law which would annul this essential part of it."[1]

But to establish exemption from liability to taxation there must be an explicit contract.

In the Providence Bank *v.* Billings (1830), the legislature of Rhode Island, in 1822, had imposed a tax upon the capital stock of the Providence Bank, which had been incorporated by the same legislature in 1791. The Bank resisted the tax as a contravention of the Contract Clause: thinking doubtless of Marshall's own judgment in McCulloch *v.* Mary-

[1] I have been unable to ascertain whether the lands in question are still tax-free. There can have been no relevant change in the facts, except a renunciation by the freeholders of their privilege, or an interruption in the chain of title.

land, in which he had said that "a power to tax is a power to destroy," they contended that the power to tax may be so wielded as to defeat the purpose for which the charter was granted. But Marshall was unmoved. There can be no implied exemption from taxation. "Any privileges which may exempt [the Bank] from the burdens common to individuals do not flow necessarily from the charter, but must be expressed in it, or they do not exist."

And in the Rector of Christ Church *v.* the County of Pennsylvannia (1861) a claim by the Christ Church Hospital, an asylum for poor and distressed widows, to perpetual exemption from taxation was defeated, chiefly on the ground that no valuable consideration had been given for the original grant of the privilege, and there was therefore no indefeasible contract.[1] The Court said that the Act by which exemption from taxation had originally been granted "belongs to a class of Statutes in which the narrowest meaning is to be taken which will fairly carry out the intent of the legislature." Bentham says: I am quoting Mr. Justice Campbell's judgment—"that all laws may be said to be framed with a view to perpetuity; but perpetual is not synonymous to irrevocable, and the principle on which all laws ought to be, and the greater part of them have been established, is that of defeasible perpetuity—a perpetuity defeasible by an alteration of the circumstances and reasons on which the law is founded."

[1] Implying, *semble*, that a Statute is not a specialty.

LECTURE V

THE 14TH AMENDMENT

THE Civil War was brought to an end in April 1865 by the surrender of General Lee at Appomatox. In the course of the following five years three amendments were added to the Constitution, the 13th, the 14th, and the 15th, the purpose of which was to establish under the authority of the Constitution the principal results of the triumph of the Federal cause. The 13th Amendment prohibited slavery; the 15th Amendment forbade the denial of the suffrage to former slaves; and the 14th Amendment, which consists of five sections, made various provisions, designed partly for the protection of the recently emancipated negro population of the Southern States, and partly to emphasize the fact that those States had been in rebellion. Of these sections I am at present only concerned with the first. I have quoted it before in these lectures, but I must quote it again. It runs as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." These words meant that that part of Chief Justice Taney's decision in the Dred Scott case, where he had held that descendants of African slaves could not be citizens, was reversed.

Then the section goes on to provide that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It may be doubted whether many of the legislators who voted for the adoption of the 14th Amendment appreciated the extent to which they were, implicitly at any rate, changing the Constitution of the United States. They were, in fact, as it turned out in the long run, arming the Federal Judiciary with new and very extended powers of censorship over the acts of the State legislatures. Long years after the negro question had fallen into the background[1] the outstanding words of the Amendment: "Privileges or Immunities," "Equal Protection of the Laws," and above all, the expression, "Due Process of Law," were receiving an ever-expanding application in the condemnation of State Statutes which appeared to the Supreme Court to be arbitrary, unjust, or unreasonable.[2] This process did not begin at once; in fact it is possible to say that it did not begin till about the year 1890;[3] but as time went on, the first section of the 14th Amendment, and in particular the principle of Due Process of Law, came to be invested with so wide and general an interpretation that it has thrown all other constitutional restrictions upon the powers of the States into the shade. And the amplification of the meaning of "Due Process of Law," as used in the 14th Amendment, has reacted upon and carried with it the interpretation of "Due Process of Law," as used in the 5th Amendment —where, as you will remember, it applies only to Federal Statutes. And one result has been that though the Constitution as originally drafted, and as originally understood,

[1] But "one is tempted to say that for the main purposes in the minds of its originators, the 14th Amendment has been a complete failure." McLaughlin, p. 727. But cf. Nixon *v.* Hendon (1927), where a Texas Statute excluding negroes from participation in Democratic Party primary elections was held to be unconstitutional under the 14th Amendment.

[2] "What 'due process of law' to-day means in relation to State legislative powers is *the approval of the* Supreme Court." Corwin, *The Twilight of the Supreme Court*, p. 89.

[3] The new departure may be dated from the decision in Chicago, Milwaukee and St. Paul R.R. *v.* Minnesota (1890), in which the Supreme Court held that legislative regulation of railroad rates was subject to judicial review as to its reasonableness.

did not forbid Congress passing laws which impaired the obligation of contracts (that restriction being imposed upon the States only), the 14th Amendment has taught the 5th Amendment, which had hitherto stayed rather coyly in the background, that any interference with a vested right which the Supreme Court thinks unjust or unreasonable is an offence against Due Process, so that, since a valid contract creates vested rights, the Contract Clause, sheltering behind the 5th Amendment, has now come to control Acts of Congress.

"Due Process of Law," whether in the 5th or in the 14th Amendment, originally meant what the layman would naturally suppose it to mean, namely, the operation of law "in its regular course of administration through Courts of Justice."[1] But recently it has been said that "the guarantee of due process of law is so all-inclusive that all other constitutional guarantees could be abolished and there still would be sufficient protection of personal liberty. The Due Process limitation has already been extended to include many of the other constitutional guarantees, and there is no rational reason against its being extended to include all of them; the tendency is in this direction. . . ." And Professor Willis, whom I am quoting, adds that "due process of law, better than any of the other constitutional guaranties, gives the Supreme Court the opportunity to draw the line which ought to be drawn between personal liberty and social control."[2]

Such being the pre-eminence of the Due Process clause, you will understand why, in relating the history of the application of the 14th Amendment, I shall lay little emphasis upon its two companion clauses, the Privileges

[1] Corwin, op. cit., p. 68; and p. 202 n. (40).

[2] Willis, p. 642. Mr. Warren remarks that after about the year 1875, it became evident "that the Privilege and Immunity Clause of the Amendment, as construed by the Court, afforded slight protection to an individual, and no protection to a corporation, affected by oppressive State legislation. Consequently, litigants and their counsel began to take appeals to the Supreme Court, based on the Due Process clause." Warren, Vol. II, p. 567.

and Immunities clause, and the Equal Protection of the Laws clause. If I were to divide my subject into three heads corresponding to these three subjects, I should give you a false impression of their relative importance.[1]

In spite of the fact that the outcome of the fierce conflict of the Civil War might have been expected to discredit the cause of State Rights, and to dispose the Supreme Court to give the most vigorous effect to the 14th Amendment, this did not in fact happen. It was not until twenty years or more had elapsed after the adoption of the amendment that doctrines of *laissez-faire*, invoked by the great corporations in their battles with the State legislatures, began to control the decisions of the Federal Courts, and to give wide and decisive efficacy to the Due Process Clause. In the intervening period between 1868 and 1890 or 1900,[2] before this change of direction took place, the Federal Judges showed a general disposition to minimize the meaning of Due Process and to vindicate the police power of the States.

The Slaughter-House Cases

The first case in which the Supreme Court was called upon to interpret the 14th Amendment has a plural name, which makes it somewhat difficult to talk about. It is known as The Slaughter-House Cases, and was decided in 1873. In 1869 the "carpet-bag" legislature of Louisiana had passed an act entitled: "An Act to protect the health of the City of New Orleans, to locate the stock landings and slaughter-houses, and to incorporate The Crescent City Livestock Landing and Slaughter-House Company." This Act gave the new company a twenty-five years' monopoly of the slaughter-house business in the city of New Orleans; and its effect was to put an end to more than a thousand previously established businesses. The butchers were not

[1] Brown, J., in Holden *v.* Hardy (1898) said: "As the three questions of abridging [the citizens'] immunities, depriving them of their property, and denying them the protection of the laws, are so connected that the authorities upon each are, to a greater or less extent, pertinent to the others, they may properly be considered together."

[2] It is obvious that no very precise date can be given as that on which *laissez-faire* began to prevail over police power.

disposed to surrender without a fight; and the Corporation took proceedings to obtain injunctions, which came by writ of error before the Supreme Court. The butchers invoked the Privileges and Immunities Clause, the Equal Protection Clause, and the Due Process Clause, but the Court declined to hold anyone of the three to be applicable. Mr. Justice Miller, speaking for the majority, said that the Privileges and Immunities Clause applied only to those general rights which a person enjoys as a citizen of the United States, and not to those rights, such as the right to do business as a butcher in a particular town, which he may claim as a citizen of a State; the Due Process Clause had long been familiar in the 5th Amendment, and "under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision"; and as for the Equal Protection of the Laws, it was clear from the history of the amendments, and their pervading purpose, that this clause was directed exclusively to the protection of the newly emancipated negroes.[1]

Four years later, in 1877, the Court gave its judgment in the famous case of Munn *v.* Illinois, which was decided on the same day as the so-called Granger Cases, of which I spoke in a previous lecture in connection with the Commerce Clause, and in which the Court had upheld the validity of State legislation regulating freights on railroads. Munn v. Illinois

In 1871 the legislature of the State of Illinois had passed an Act which required managers of public warehouses or elevators for the storage of grain to be licensed on penalty of a fine, fixed maximum rates for the storage and handling of grain, and forbade discrimination. Munn was prosecuted

[1] The monopoly granted to the Crescent City Company was afterwards repudiated by the city authorities, and their action was sustained by the Supreme Court in Butchers' Union Slaughter-House Company *v.* Crescent City, etc., Co. (1883). Cf. p. 87.

and fined under the Statute for operating an elevator without having obtained a licence, and for having charged rates higher than the prescribed maximum. Before the Supreme Court Munn contended that the Illinois Statute was unconstitutional, because, among other things, it was repugnant to the 14th Amendment.

Chief Justice Waite, in an elaborate and famous judgment sustaining the validity of the Statute, referred to a remark of Lord Hale's, in his Treatise *de Portibus Maris*, that when private property is affected with a public interest it ceases to be *juris privati* only; and he went on to say that common carriers, ferrymen, inn-keepers, bakers, millers, and so forth, exercise a sort of public office, and have duties to perform in which the public is interested. It had been customary in England from time immemorial, and in America from its first colonization, for government, in the exercise of its police power, to regulate such businesses, and in so doing to fix a maximum charge to be made for services rendered, accommodations furnished, and articles sold; and that down to the time of the adoption of the 14th Amendment it had never been supposed that Statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. And the amendment had not altered the law as to what constituted Due Process; it simply required the States to respect that law. Consequently, the only questions in the case were whether Munn's business was of such a character as to be affected with a public interest; and whether the Statute could be regarded as being directed to the protection of that interest. Whether or no the business of the operation of a Chicago grain elevator was affected with a public interest was a question of fact, as to which there could be no doubt. As to the second question, the Chief Justice said: "We must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the Statute now under consideration was passed. For us, the question is one of power, not of expediency. . . .

Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge. . . . We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the Courts." A famous phrase, for which Chief Justice Waite is nowadays being canonized. But it expressed a view of the efficacy of the 14th Amendment very different from that which afterwards gained the ascendancy. For when, in later years, the Supreme Court went over on the other tack, the distinction between power and expediency was practically rejected, and expediency, as appreciated by the Court, was made the test of legislative power.

The reluctance of the judges, during the period of which I am speaking, to give any very wide application to the 14th Amendment is illustrated by the fact that in 1878, at a time when less than twenty cases involving the amendment had been submitted to the supreme Court,[1] Mr. Justice Miller, in Davidson *v.* New Orleans (1878), said: "It is not a little remarkable that while this provision [meaning the Due Process Clause] has been in the Constitution of the United States, as a restraint upon the authority of the Federal Government, for nearly a century, and while, during all that time, the manner in which the powers of that Government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been a part of the Constitution as a restraint upon the power of the States only a very few years, the docket of this Court is crowded with cases in which we are asked to hold that State Courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some

[1] Warren, Vol. II, p. 598.

strange misconception of this provision as found in the 14th Amendment. In fact it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this Court the abstract opinions of every unsuccessful litigant in a State Court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded."

And in 1885, in Missouri Pacific Railway Co. *v.* Humes, the Court, through Mr. Justice Field, expressed "its increased surprise at the continued misconception of the purpose of the provision"; and again asserted that "the hardship, impolicy, or injustice of State laws is not necessarily an objection to their constitutional validity." So long as the States' action is not purely arbitrary, and the enforcement of the law is "attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice or oppressive character of the laws will not invalidate them as affecting life, liberty, or property without due process of law."

"These expressions of alarm," says Mr. Warren, in his history of the Supreme Court, "while scarcely required by the actual number of cases then presented, were later to be justified. For while less than seventy cases were decided under the amendment in the sixteen years between 1873 and 1888 inclusive, about seven hundred and twenty-five were so decided in the thirty years from 1888 to 1918."[1]

These mass assaults upon State legislation under the banner of the 14th Amendment were, it is true, successful only in a small fraction (something in the neighbourhood of ten per cent) of the cases;[2] but it is reasonable to suppose

[1] Warren, II, p. 599.

[2] Warren, II, p. 740. Between 1889 and 1918 inclusive, 422 State Statutes passed under the police power were attacked before the Supreme Court under the 14th Amendment. Of these only 53 were

that a change in the attitude of the Supreme Court towards the amendment, a change which, as I have already said, began to be perceptible in the '90's, acted as a distinct encouragement to litigants in invoking the Due Process Clause.

I will now attempt to illustrate the manner in which, since the decision of Munn *v.* Illinois, the Supreme Court, steering sometimes to port and sometimes to starboard, has endeavoured to draw the line between the domain of application of the 14th Amendment and the domain reserved for the exercise of the police power. To tell this story properly would require a ten thousand-foot reel; but time compels me to content myself with a few snapshots; so that I am in danger of making a long and fluctuating process look like a state of static inconsistency. And for my present purpose I shall not think it necessary to distinguish between State legislation and Federal legislation; because the concept of Due Process has been elaborated *pari passu* under the 14th Amendment as applied to the States, and under the 5th Amendment as applied to Acts of Congress. In both domains the general and prevailing tendency of the Court has been to expand the limits of its censorial power; so much so that it has been said that the Court has succeeded in turning itself into a third house of the legislature, both in the States and at Washington. In the domain in which Due Process has its primary meaning, that of judicial procedure, the Supreme Court has, however, shown itself tolerant of innovation.[1]

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held to be unconstitutional, and of these about two-thirds related to rates and regulations of public service corporations. (Ibid.)

But as Professor Frankfurter has observed, "a single decision may affect a great body of legislation. Examples of such far-reaching consequences are the decisions invalidating the Kansas Law, which was directed against coercion of workers from joining trade unions. . . . Similarly, a single decision involving valuation of utilities may affect utility valuations in every State and every city of the Union." (*The Public and Its Government*, p. 48.)

[1] And for this reason it has been severely criticized from the Radical standpoint. "The Supreme Court and Civil Rights," Louis B. Boudin; *Science and Society*, p. 273 (1937).

In Hurtado *v.* California, for example, a case which was decided in 1884, it was held that a conviction for murder was not invalid as a denial of Due Process by reason of the fact that the proceedings had been initiated, as the Constitution of the State permitted them to be, by information instead of by indictment, that is to say, without a previous finding by a grand jury. It was maintained for the appellant that "Due Process of law" is equivalent to the "law of the land" as found in the 29th chapter of Magna Charta; that by immemorial usage it had acquired a fixed, definite, and technical meaning; that it referred to those venerable institutions, including the grand jury, "which, having been the birthright and inheritance of every English subject, crossed the Atlantic with the colonists and were transplanted and established in the fundamental laws of the State." The Supreme Court, by Mr. Justice Matthews, rejected this contention. The amendment was not intended to bind the States to particular forms, however ancient, but to guarantee the substance of individual rights. "We are unable to say that . . . the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not Due Process of law."

In Eilenbecker *v.* the District Court of Plymouth County it was decided in 1890 that the petitioner could not complain that he had been deprived of liberty and property without Due Process of law, because, having violated an injunction against selling intoxicating liquor, he had been tried for his contempt of court, not by a jury, but on affidavit evidence only, and on conviction had been fined and imprisoned. The Court held that whether or no the proceedings were criminal proceedings, disobedience to an injunction "is an offence against the Court and against the administration of justice, for which the Courts have always had the right to punish the party by summary proceeding and without trial

by jury; and that in that sense it is Due Process of law within the meaning of the 14th Amendment."[1]

In cases in which the amendment has been invoked in defence of what I may call the natural rights of the citizen under free institutions the Supreme Court has been a vigorous guardian of liberty.

In the case of Meyer *v.* Nebraska, decided in 1923, the Court had before it a Nebraska State law passed in 1919, which made it a misdemeanour for any school teacher to teach in any language but English. Meyer had been convicted of teaching in German. It was contended for the State that "the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues before they could learn English and acquire American ideals, and that the English language should be and become the mother tongue of all children reared in the State." But the Supreme Court held that "no emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long and freely enjoyed. We are constrained to conclude that the Statute as applied is arbitrary and without reasonable relation to any end within the competency of the State."

Two years later, in the case of Pierce *v.* the Society of the Sisters of the Holy Names of Jesus and Mary (1925), the Court condemned an Oregon Statute which required all children between the ages of 8 and 16, with certain exceptions, to be sent to a "public school," meaning a school supported by the State. The respondent society had for many years maintained Catholic schools. Citing the doctrine of Meyer *v.* Nebraska, the Court held that the Act inter-

[1] Although Due Process is most frequently invoked against legislation, it seems clear that it is not confined to this field. Willis, p. 706. In Mooney *v.* Holohan (1935) the Supreme Court held that Due Process had been denied where a State had procured a conviction by the deliberate use of evidence known to be perjured.

fered unreasonably with the liberty of parents and guardians to direct the upbringing and education of children under their control. "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State."

And in 1931, in the case of Near *v.* Minnesota, the Supreme Court reviewed and disallowed a State law which provided for the abatement, as a public nuisance, of any "malicious, scandalous, and defamatory newspaper, magazine, or other periodical." Proceedings had been taken under this Statute for the suppression of the paper owned by Near, the *Saturday Press* of Minneapolis, for its repeated attacks upon the mayor of the city, the chief of police, and other public characters, charging them with being in league with gangsters, racketeers, and bootleggers. The Court, by the mouth of Chief Justice Hughes, said that it was "no longer open to doubt that the liberty of the Press and of speech is within the liberty safeguarded by the due process clause of the 14th Amendment from invasion by State action"; and that "the fact that the liberty of the Press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the Press from previous restraint in dealing with official misconduct."

On the other hand in 1927, in the case of Whitney *v.* California, the Court sustained an Act which made it a felony to belong to an organization for the promotion of criminal syndicalism, criminal syndicalism being defined as any doctrine advocating [resort] to unlawful violence as a means of accomplishing a change in industrial ownership or control, or effecting any political change.[1]

That a State, said the Court, "in the exercise of its police power, may punish those who abuse [the constitutional right of free speech] by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or

[1] The definition is here abridged.

endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question." This decision excited considerable feeling for the reason that the defendant was a politically minded lady of socialist sympathies, and it was contended that the Statute was so drafted as to make it possible for the jury to convict her without proof that she personally contemplated the use of unlawful violence.[1]

That the police power may prevail over Due Process in cases where the right in controversy is a person's right to their own body, may be illustrated by two cases: that of Jacobson *v.* Massachusetts, decided in 1905, in which the Supreme Court upheld a Compulsory Vaccination law; and that of Buck *v.* Bell, decided in 1927, in which a Virginia Statute was sustained which authorized an operation for sterilization to be performed, after decision by a Court, upon a feeble-minded person. In the vaccination case the Court referred to "the knowledge which, it is safe to affirm, is common to all civilized peoples touching smallpox and the methods most usually employed to eradicate that disease." In the sterilization case, in which the appellant was not only herself feeble-minded, but was the daughter and the mother of a feeble-minded person, Mr. Justice Holmes, who always opposed the inroads of the 14th Amendment upon legislative liberty, said, speaking for the Court, that "we have seen, more than once, that the public welfare may call upon the best citizens for their lives. It would be strange indeed if it could not call upon those who already sap the strength of the State for these lesser sacrifices . . . in order to prevent our being swamped with incompetence."

The Due Process Clause has been successfully invoked

[1] But in Herndon *v.* Lowry, decided in 1937, the Court condemned as unconstitutional a section of the Georgia Penal Code, directed against seditious agitation, under which it would be possible for a jury to convict if it held that the accused should have appreciated that his propaganda might, in the distant future, eventuate in a combination to offer forcible resistance to the State.

in cases of double taxation, to establish the principle: "One man, one thing, one tax."[1]

The Union Refrigerator Transit Company was a Kentucky Corporation which owned and operated refrigerator cars running on the railroads all over the United States. A Kentucky Statute declared that the personal estate of all corporations organized under the laws of the State, whether the property were in or out of the State, was subject to taxation. The Corporation, having been taxed under this Statute in respect of the cars it owned outside Kentucky, appealed to the Supreme Court, which held the Act to be unconstitutional.[2] The Court, by Mr. Justice Brown, said that "the power of taxation . . . is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property. . . . If the taxing power be in no position to render these services or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another State, to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicil of the owner . . . [is a] taking of property without Due Process of law." Mr. Justice Holmes, while agreeing with the decision, as a matter of judicial legislation, did not see how it could be deduced from the 14th Amendment.

In Farmers' Loan and Trust Company *v.* Minnesota, decided by the Supreme Court in 1930, the facts were that one Henry Taylor, a domiciled citizen of New York, had died leaving, as part of his estate, bonds issued by the State of Minnesota and by the Cities of Minneapolis and St. Paul. Upon the transfer of these bonds under the testator's will, the State of Minnesota purported to levy an inheritance tax in accordance with its own laws. The Supreme Court applied the two principles that for purposes of taxation,

[1] Beale, *Conflict of Laws*, I, p. 521.
[2] Union Refrigerator Transit Co. *v.* Commonwealth of Kentucky (1905).

intangible property, such as negotiable bonds, is deemed to be situated in the domicile of the owner, and that no State may tax anything not within her jurisdiction without violating the 14th Amendment. Mr. Justice Holmes, dissenting, again expressed his unfashionable disapproval of the wide application given to the Due Process Clause. "A good deal has to be read into the 14th Amendment," he said, "to give it any bearing on this case. The Amendment does not condemn everything that we may think undesirable on economic or social grounds." And Mr. Justice Brandeis agreed with him.

I now turn to freedom of contract. A legislature may interfere with contracts not only by impairing the obligation of contracts already made, but also by restricting the freedom to make future contracts; and the Supreme Court has frequently been called upon to apply the test of Due Process to legislation of this kind. I have already touched upon this subject in speaking of the regulation of railway rates; but the subject of the regulation of the charges of public utility corporations, and of the control exercised by the Supreme Court over the activities of the Inter-State Commerce Commission, is too large for the scope of these lectures; and I must once again pass it by with an apology.

An early case on freedom of contract in general is Allgeyer *v.* Louisiana, decided in 1897, a case which arose as follows. A Louisiana Statute had made it an offence for any person to do, within the State, any act for effecting a contract of marine insurance on property within the State with any company which had not complied with the State laws. Allgeyer, having taken out an open policy with a New York company, had sent to his insurer, from Louisiana, a notification of the attaching of a particular risk on a shipment of cotton. For posting this notification he was prosecuted and penalized. Mr. Justice Peckham, speaking for the Supreme Court, asserted the right of freedom of contract in very high terms. The "liberty," mentioned

in the Due Process Clause means, he said, "not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned." So the Louisiana Statute was condemned.

On the other hand, in German Alliance Insurance Company *v.* Lewis (1914) the Court upheld a Kansas Statute which empowered the State superintendent of insurance to fix rates for insurance. The German Alliance Company, which was a New York fire insurance company, contended that the Kansas Statute offended against the Due Process Clause, on the ground that "where the right to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist"; in other words that the liability to public regulation only applied to businesses like that of carriers and innkeepers, which are obliged to serve any applicant. It was also contended that the right of regulation only arises "upon the ground of special privilege conferred by the public upon those affected." The Court, speaking by Mr. Justice MacKenna, denied both contentions, and laid down that "the underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation"; and that the business of insurance against fire obviously came within that description.

Nebbia v. New York

A recent and striking case in the same sense is that of Nebbia *v.* New York (1934), in which the Court reviewed a New York State law of 1933, establishing a Milk Control Board with power to fix retail prices for milk. The Board fixed nine cents as the price to be charged by a retailer for

a quart of milk. Nebbia, the proprietor of a grocery shop in Rochester, sold two quarts of milk and a five-cent loaf of bread for eighteen cents. He was convicted, and in due course brought his case before the Supreme Court, where the New York law was upheld by a five to four decision.

The judgment, given by Mr. Justice Roberts, begins with a rehearsal of the very thorough investigation which the New York legislature had caused to be undertaken into the unsatisfactory conditions governing the production and distribution of milk in the State, an investigation the results of which led to the passing of the Milk Law.

And at this point let me digress for a moment to remark that the fact that the Supreme Court undertakes, under the Due Process Clause, to adjudicate upon the reasonableness of State and Federal legislation, must necessarily lead it, in many cases, to examine the conditions with which the legislature was confronted, and the merits of the policy which it had thought fit to adopt. The orthodox doctrine is that the Court will not ask more than to be satisfied that, in view of the social or economic problem to be dealt with, the policy adopted was a plausible one; but as in the case of the analogous question with which we are familiar, the question whether there was evidence upon which the jury could return the verdict they did, it is perhaps not always easy for the Court to distinguish between a plausible policy, and a policy of which the Court approves. But the fact remains that in the last thirty years the Supreme Court has been ready to entertain evidence on an extensive scale of the social justification of laws attacked before it. The first case in which the relevance of evidence of this kind was recognized by the Court was that of Muller *v.* Oregon, decided in 1908, in which an Oregon Ten Hours Day law for women was sustained. In this case Mr. Brandeis, as he then was, as Counsel for the State, filed a lengthy brief citing both American and European legislation of the same character, together with extracts from over ninety reports of Committees, bureaux of statistics, inspectors of factories,

both in America and in Europe, to the effect that long hours of labour are dangerous for women.[1]

But to return to Nebbia *v.* New York. Having recited, as I have said, the facts and the investigations relied on by by the New York legislature as justifying its interference with liberty of contract in the Milk Market, Mr. Justice Roberts went on to consider whether the Statute, however beneficial, must nevertheless be condemned under the Due Process Clause. In answering this question in the negative, he condemned the doctrine that public control under the police power could be exercised only in respect of a restricted class of businesses defined as those affected with a public interest, as well as the suggested doctrine that public control could not constitutionally take the form of regulation of prices. "It is clear," he said, "that there is no closed class or category of businesses affected with a public interest, and the function of the Courts in the application of the 5th and 14th Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exercise of governmental authority or condemn it as arbitrary and discriminatory. The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good." In other words, the right to control is not dependent upon the existence of a public interest; the existence of a public interest is to be inferred from the right to control. And as to the specific power to regulate prices, the judgment says: "If, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the State from correcting existing maladjustments by legislation touching prices? We think there is no such principle. The Due Process Clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. . . . There can be no doubt

[1] Frankfurter, *Hours of Labour and Realism in Constitutional Law*, 29; *Harvard Law Review* p. 353 (1916).

that upon proper occasion and by appropriate measures the State may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells."[1] This recent decision would appear to mark a definite approach by the Supreme Court to what I may call a more liberal, because a more restricted, view of the empire of the 14th Amendment in the domain of commerce.

In no sphere has the Court shown greater variations in its leanings than in that of the regulation of conditions of labour and the contracts which govern the relations between employer and employees.

In Knoxville Iron Co. *v.* Harbison, decided in 1901, the Court upheld what we should call a Truck Act—though the expression does not appear to be current in America—a State Statute requiring that orders on company stores issued in payment of wages be redeemable in cash.

On the other hand, in Coppage *v.* Kansas (1915) the Court condemned a Statute which made it a misdemeanour for any employer to impose, as a condition of entering or remaining in his employment, the acceptance by an employee of what is known as a "yellow dog" contract. A "yellow dog" contract, I should explain, is one under which an employed person agrees with his employer not to belong to any labour union. Mr. Justice Pitney, speaking for the majority of the Court, said that the exercise of the police power for the purpose of lending support to labour organizations was no more legitimate than it would be to use that power to strengthen any other voluntary association. Employers had the same right to stipulate non-membership of a labour union that a union would have to require its members to refuse to work with non-union men.

In a recent case, however, the Court upheld a Federal

[1] In Baldwin *v.* Seelig (1935) it was held that the New York Milk Control Act could not be enforced against a New York dealer who bought his milk in Vermont at prices below the New York Statutory Minimum. This was an unconstitutional attempt to apply price-control in another State.

Statute, the Railway Labor Act of 1926, which provides for collective bargaining between employers and employed.[1]

Hours of Labour

Until very recently the Court refused to acquiesce in Statutes regulating the hours of labour for men, unless satisfied that such regulation was justified by the peculiarly arduous or dangerous conditions of the industry concerned.

In 1898 the Supreme Court upheld, in the case of Holden *v.* Hardy, a Utah State law establishing an eight hours' day for miners, on the ground that the legislature having judged employment underground to be detrimental to health "so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal Courts"; and on the further, and strikingly forward-looking ground that "the legislature has also recognized the fact . . . that the proprietors of these establishments and their operatives do not stand upon an equality and that their interests are, to a certain extent conflicting. The former naturally desire to obtain as much labour as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength."

Lochner v. New York

But seven years later, in 1905, in the famous case of Lochner *v.* New York, the Court condemned, under the Due Process Clause, a New York Statute which forbade any employee in a bakery or confectionery shop being permitted to work more than 60 hours in any one week—a ten hours' day law for bakers. Mr. Justice Peckham, speaking for the majority, said: "There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labour in the occupation of a baker. . . . There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade

[1] Texas and New Orleans Railway *v.* Brotherhood of Railway and Steamship Clerks (1930).

of baker. . . . To the common understanding the trade of a baker has never been regarded as an unhealthy one . . . It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives."

Mr. Justice Oliver Wendell Holmes gave a celebrated dissenting judgment in this case, in the course of which he said: "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. . . . The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every State or Municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics."

And from this side of the Atlantic, Sir Frederick Pollock, fortified no doubt by his friend's dissenting judgment, remarked, in a note in the *Law Quarterly Review*,[1] that "the legal weakness of [Mr. Justice Peckham's reasoning], if we may say so, is that no credit seems to be given to the State legislature for knowing its own business, and it is treated like an inferior Court which has to give affirmative proof of its competence. How can the Supreme Court at Washington have conclusive judicial knowledge of the conditions affecting bakeries in New York?"

Both Holden *v.* Hardy and Lochner *v.* New York were argued and decided, it may be remarked, before Mr.

[1] 21. *Law Quarterly Review*, p. 212.

Brandeis' argument in Muller *v.* Oregon had initiated the practice of supplying the Court with copious evidence of the legislative reasonableness of the Statute under discussion.

I am for the present postponing the discussion of the attitude of the Supreme Court towards New Deal legislation; but when, in my next lecture, I come to that very up-to-date subject, I shall have something more to report on the subject of hours of labour for men. I will for the moment merely remind you that twenty years ago, twelve years after the decision in Lochner *v.* New York, in the case of Wilson *v.* New, the Court sustained, on grounds of national emergency, the so-called Adamson Act, a Federal Act which prescribed an eight-hour day for railwaymen.[1] Meanwhile the Court has consistently sustained, as having a plain relation to public health, State Acts regulating the hours of labour for women, and for children.[2] It is only in the case of Federal Statutes, purporting to prohibit inter-State commerce in the products of child labour, that the Court has been adverse, on the ground that such regulation is not within the power given by the Commerce Clause.[3]

Minimum Wages

The Court has, until very recently, refused, save on the ground of emergency, as in Wilson *v.* New, to sustain either Federal or State legislation purporting to regulate minimum rates of wages, even in the case of women. In 1923, in the case of Adkins *v.* The Children's Hospital of the District of Columbia, the Court condemned a Federal Act which authorized a board to declare minimum wages for women in any occupation within the District of Columbia, based upon an estimate of what wages are necessary "to maintain such women workers in good health and protect their morals."

Mr. Justice Sutherland, speaking on behalf of the majority of the Court, said that the Statute was bad on two main grounds: first, that it provided no clear standard by which the board was to be guided; and second, that it was oppres-

[1] See *ante*, p. 65.
[2] Willis, p. 734.
[3] Hammer v. Dagenhart (1918). See *ante*, p. 66.

sive to employers, requiring them to pay prescribed wages without reference to the state of trade or to the efficiency of the labour supplied: and he argued that if the police power authorized the fixing of minimum wages, it would also authorize the fixing of maximum wages, if, for example, wages in the building trades should in the future rise so high as "to preclude people of ordinary means from building and owning homes." Chief Justice Taft and Mr. Justice Holmes dissented, the latter remarking that he did not "understand the principle on which the power to fix a minimum for the wages of women can be denied by those who admit the power to fix a maximum for their hours of work."

The effect of the Adkins case was the disallowance of sixteen State Statutes providing for the fixing of minimum wages for women. But last year, in 1937, in the case of the West Coast Hotel Company *v.* Parrish, the Court went completely over on the opposite tack, and expressly overruled the Adkins case. The Statute which was subject to review in this case was an Act of the legislature of the State of Washington passed so long ago as 1913—and I may call your attention to the fact that this Act had been in force for 24 years before its validity was called in question before the Supreme Court; in the meantime it had twice been upheld by the highest Court of the State. It provided that it should be "unlawful to employ women or minors in any industry or occupation within the State of Washington under conditions of labor detrimental to their health or morals"; and it set up a board authorized to establish standard rates of wages. Relying upon this Act, the respondent, Elsie Parrish, brought suit against the hotel by which she was employed as a chambermaid, to recover the difference between the wages paid her and the minimum fixed by the board of $14.50 per week of forty-eight hours. The appellant invoked the Due Process Clause.

Chief Justice Hughes, speaking for a five to four majority of the Court, said that "the importance of the question, in

which many States having similar laws are concerned, the close division by which the decision in the Adkins case was reached, and the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the State must be considered, make it . . . imperative that [the Adkins case] should receive fresh consideration." Referring to the contention in the Adkins judgment that a minimum wage law takes no account of the unequal efficiency of labour, Chief Justice Hughes quoted a passage from Chief Justice Taft's dissenting opinion, to the effect that "legislatures which adopt a requirement of . . . minimum wages may be presumed to believe that when sweating employers are prevented from paying unduly low wages by positive law they will continue their business, abating that part of their profits which was wrung from the necessities of their employees, and will concede the better terms required by the law; and that while in individual cases hardship may result, the restriction will ensure to the benefit of the general class of employees in whose interest the law is passed, and so to that of the community at large"; and he went on to say that "we think that the views thus expressed are sound and that the decision in the Adkins Case was a departure from the true application of the principles governing the regulation by the State of the relation of employer and employed." And in a later passage the Chief Justice called attention to the fact that "the bare cost of living must be met. . . . What these workers lose in wages the taxpayers are called upon to pay". . . . But "the community is not bound to provide what is in effect a subsidy for unconscionable employers."

LECTURE VI

THE NEW DEAL

IN this, my last, lecture, I am going to give you some account of the questions of Constitutional Law which have agitated America during the last five years; that is to say, since President Roosevelt was inaugurated on 4 March 1933.

I have neither the time nor the knowledge to give you an account of the Great Depression, or of America's recovery, from the standpoint of the economist. I must confine myself to a brief history of the conflicts of constitutional law to which the President's programme of remedial legislation has given rise. But a few figures are necessary to give you the background of economic distress against which the legal story moves.

In the three years before 1933 there had been 5,000 bank failures. The number of unemployed had increased from about 3 millions to about 13½ millions: industrial production had fallen by 47 per cent; the value of farm products by 71 per cent; and the estimated national income by 56 per cent.[1]

To appreciate the meaning of these figures it is necessary to remember that America possessed no poor law; no nation-wide system of unemployment insurance, medical insurance, or old-age pensions; and that the Trades Union movement was weak and faltering.

In the first two months of 1933 the depression moved to a climax. Banking failures multiplied; the collapse of public

[1] These figures are taken from Yoder and Davies, *Depression and Recovery*.

confidence led to withdrawals of deposits and to hoarding of currency on an unprecedented scale; and in February a movement set in throughout the country to save the banks by the proclamation of moratoria, and the drastic restriction of the rights of depositors.

The Washington correspondent of *The Times*, telegraphing on 1 March, said: "The United States is for the time being in a state of complete paralysis of public confidence. From this to a paralysis of trade lasting for an indefinite period is but a step, unless Mr. Roosevelt can intervene. The danger is imminent and is hardly susceptible of exaggeration."

The immediate banking crisis was relieved by the emergency measures taken by the new administration in the first few days of its existence; and the Government obtained a breathing space in which to devise and to launch the extensive campaign for meeting the general depression which is known as the New Deal.

The economic distress from which the country was suffering had three aspects. The banking system had collapsed, with the result that the available circulatory medium—let me say the available amount of current legal tender—had been reduced by perhaps as much as 80 per cent. Prices had fallen to such a level that the burden of mortgages and other fixed charges had greatly increased, and that profits both of farming and of manufacture had to a large extent been annihilated. The resulting paralysis of trade and production had thrown about one in four of the working population out of employment, and, by greatly restricting the effective demand for consumers' goods, had destroyed the normal balance between supply and demand.

The programme which the President sketched in his Inaugural Speech[1] stated as the primary task of the administration the putting of the people back to work; but with this main purpose he coupled the encouragement of settlement on the land; the raising of the value of agricultural produce;

[1] *The Times*, 6 March, 1933.

the restriction of foreclosures on small homes and farms; national planning for and supervision of, all forms of transportation, communication, and other public utilities; the establishment of strict supervision of all banking and credit investments. All these purposes have, in the sequel, been at least partially realized. But, as we all know, several of the President's most important measures have been defeated on constitutional grounds by the adverse decision of the Supreme Court.

Of these measures the two most outstanding were the National Industrial Recovery Act and the Agricultural Adjustment Act, the first of which had for its object the relief of the urban worker, while the second was designed to save the farmer. Of these Acts, both of which were passed in the early summer of 1933, I shall now speak.

The N.I.R.A.

The purposes of the National Industrial Recovery Act[1] were stated in the first section to be: to remove obstructions to the free flow of inter-State and foreign commerce; to promote co-operative action between trade groups; to induce and maintain united action of labour and management under Government supervision; to eliminate unfair competition; to promote the fullest possible utilization of the present productive capacity of industries; to avoid undue restriction of production; to increase the consumption of industrial and agricultural products by increasing purchasing power; to reduce and relieve unemployment; to improve standards of labour; and otherwise to rehabilitate industry and to conserve national resources.[2] This was an ambitious programme; and certainly implied a liberal view of the domain of the Commerce Clause.[3]

[1] 16 June 1933.

[2] The statement of objects has been somewhat abbreviated.

[3] When affixing his signature to the Act on 16 June 1933, the President declared that: "History probably will record the National Industrial Recovery Act as the most important and far-reaching legislation ever enacted by the American Congress. It represents a supreme effort to stabilize for all time the many factors which make for the prosperity of the nation and the preservation of American standards. Its goal is the assurance of a reasonable profit to industry

The Act was divided into two titles; the first headed "Industrial Recovery," the second "Public Works and Construction Projects."

The second title provided for a large programme of public works, and set up an organization known as the Federal Emergency Relief Administration for the purpose of administering that programme. As the activities of this body do not appear to have provoked any constitutional controversy,[1] I shall say no more about it.

The first title of the Recovery Act was more novel in conception. It authorized the President to approve, and by approving to put in force, codes of fair competition for any trade or industry which might petition to be regulated, or as to which the President might be satisfied that there prevailed in it abuses inimical to the public interest or contrary to the declared policy of the Act. Section 7 (a) of the Act contained provisions of outstanding importance. They were to the effect that every code approved under the Act should contain the following conditions:

First: that employees should have the right to bargain collectively through representatives of their own choosing; second: that no employee should be required, as a condition of employment, to join any company union, or to refrain from joining any union he liked; this provision was directed against yellow dog contracts and the decision of the Supreme Court in Coppage *v.* Kansas (1915).[2]

The third condition which every code was required to incorporate was to the effect that employers should comply with the maximum hours of labour, the minimum rates of

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and living wages for labour, with the elimination of the piratical methods and practices which have not only harassed honest business, but also contributed to the ills of labour." (Cit., *The National Recovery Administration*, L. S. Lyon and others, 1935, p. 3..)

[1] Save for controversy as to the legitimacy of loans and grants under the Act to assist in the construction of municipally owned electric-lighting systems. Cf. Duke Power Co. *v.* Greenwood County (1936).

[2] Cf. p. 117, *ante*.

pay, and other conditions of employment, approved or prescribed by the President.[1]

A violation of any provision of a code in any transaction in or affecting inter-State or foreign commerce was declared to be a misdemeanour.

The task of administering the first title of the Act was given to General Hugh S. Johnson, a man of great energy and power of work, who took the widest possible view of his duties. Instead of confining himself to the regulation of a limited number of basic industries, he embarked upon a policy of codification extending to all imaginable branches of trade and industry. By April 1935 between 500 and 600 codes had been put in force, ranging from banking to the manufacture of brooms and from brewing to the manufacture of corn cob pipes and powder puffs.

The Cotton Textile Code,[2] which I may take as an example, established a 40-hour week in the industry, fixed a minimum weekly wage of $12 in the South and $13 in the North, and forbade the employment of children under 16. It also provided machinery for the framing of further regulations designed to prevent the undue expansion of plant, to preserve a balance between production and consumption, to control the supply of credit, and, last but not least, to control prices.

The Recovery Act Codes seem never to have been popular; they harassed large numbers of small businesses; they are said to have more than disappointed the working classes;[3] and before two years had elapsed from the passing of the Act, the whole system was condemned by the decision given by the Supreme Court on 27 May 1935, in the case of the Schechter Poultry Corporation and others *v.* the United States.[4]

[1] Section 9 of the Act contained the provision relating to the transportation in inter-State commerce of "Hot Oil," the nature and fate of which I described in my first lecture, pp. 13*ff.*

[2] Approved 17 July 1933: *N.R.A. Economic Planning*, Roos, p. 512.

[3] 168 *Harper's Magazine*, p. 187.

[4] A vivacious account of this case may be read in Chapter XIV of *The Nine Old Men*, by Pearson and Allen.

The Schechter Case

The petitioners, who did a large business in poultry in Brooklyn, had been tried in a Federal Court, convicted, and sentenced to terms of imprisonment, for breaches of the Live Poultry Code, which had been approved by the President on 13 April 1934.[1] The heads of indictment upon which the defendants had been convicted included counts for the violation of the minimum wage and maximum hour provisions of the Code, as well as counts for the violation of provisions the object of which was to prevent retail purchasers from picking and choosing particular birds out of a coop.[2]

The defendants challenged their conviction on three grounds: first, on the ground that the Live Poultry Code had been adopted pursuant to an unconstitutional delegation by Congress of legislative power; second, on the ground that it purported to regulate intra-State transactions which lay outside the authority of Congress; and thirdly, on the ground that in certain provisions the Code was repugnant to the Due Process Clause of the 5th Amendment.

The Court unanimously accepted the defendants' first two contentions, and thought it therefore unnecessary to consider the third. The leading judgment was pronounced by the Chief Justice, while Mr. Justice Cardozo, supported by Mr. Justice Stone, gave a concurring judgment.

The code-making authority conferred upon the President is an unconstitutional delegation of legislative power, said the Chief Justice, because it is altogether too wide. The Recovery Act authorizes the promulgation of Codes of Fair Competition; but fair competition is not a term having any precise meaning in the law; in any case its meaning cannot be stretched to include all the purposes which the Act declares to be the policy of Congress, and to which purposes therefore the Act permits the Codes to be directed;

[1] The annual value of the live poultry trade in New York City was about $90,000,000.

[2] Or rather half-coop. The object presumably was to fortify the grading of poultry.

these purposes include the organization of industry, the promotion of the full utilization of existing productive capacity, and the increase of the consumption of industrial and agricultural products. "Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry."

In the second place, the offences for which the appellants had been convicted were not committed in inter-State commerce. It is true that 96 per cent of the poultry sold in New York is imported from outside the State; but the appellants' business consisted substantially in the slaughtering and distribution of poultry bought at the railroad terminals; that is to say, in the handling of goods which were no longer in transit, but had come to rest within the State. And if the appellants' transactions were not "in" inter-State commerce, neither did they substantially "affect" inter-State commerce. If all questions of wages and hours of labour in the commercial handling of imported commodities were to be held to affect inter-State commerce, the distinction between what is national and what is local in the activities of commerce would be obliterated.[1]

So that was the end of the N.R.A. Codes.

The A.A.A.

I now turn to the Agricultural Adjustment Act,[2] which ranks with the National Recovery Act as a major measure of the New Deal. Although there is a certain parallelism between the two Acts, the A.A.A. was less ambitious in scope than the N.R.A. Its main purpose[3] was to increase the purchasing power of the farmers by raising the prices of certain basic products, namely wheat, corn, rice, cotton, milk and its products, tobacco, and hogs. Prices were to be raised by restriction of output—that is to say, by creating an artificial scarcity. The restriction was to be effected by

[1] Mr. Justice Cardozo.

[2] 12 May 1933.

[3] Title I of the Act deals with restriction of production; Title II deals with Agricultural Credits.

voluntary agreements between the farmers and the Secretary of Agriculture. The farmers were to be compensated in cash or the equivalent for reducing their crops and ploughing under crops already sown; and funds were to be raised for their compensation by taxes levied on the "processors"—that is to say on the people whose business it was to turn the farmers' raw materials into consumers' goods, such as the millers, the cotton-spinners, and the slaughterers of hogs. It was contemplated that the processors would pass these taxes on to the consumers. So that in the result the consumers were to be taxed to enable the farmers to restrict their output and to raise their prices. The consumers, however, were to find their reward in the Recovery Act and other New Deal measures. I must emphasize that the taxing clauses were the only coercive part of the scheme; the limitation of output was to be voluntary on the part of the farmers.

The Hoosac Mills Case (U.S.v.Butler)

The Agricultural Adjustment Act remained in operation for nearly three years; but on 6 January 1936, it was condemned by a six to three decision of the Supreme Court in what is known as the Hoosac Mills Case, the case of the United States *v.* Butler. The respondent Butler was the receiver in bankruptcy of the Hoosac Mills Corporation, a cotton-spinning concern, from which the United States Treasury had demanded a processing tax. This claim the respondent had refused to pay, on the ground that it was unconstitutional. The judgment of the Court, which was delivered by Mr. Justice Roberts, may be summarized as follows:

The Federal Government has an undoubted right to impose such a tax as this for the general purposes of government—"to pay the debts and provide for the common defence and general welfare of the United States." But it is impossible to regard the processing taxes as being levied for the general purposes of government; their proceeds are plainly earmarked for the particular and exclusive purpose of compensating farmers who shall have consented to

restrict their output. This is a case of exacting money from one group of people and paying it to another group for the purpose of regulating a matter in which the first group is not interested. That being so, the respondents cannot be silenced by the general principle that the taxpayer as such is not entitled to question the purposes to which Congress may appropriate his payments. And being entitled to question the tax on the ground of its destination, the respondents have a right to argue, as they do, that the destination of the proceeds is unconstitutional, because it is not for the general benefit of the United States. But it is not necessary to explore this point; because the Act, and the taxes which it prescribes, are bad for a different reason; namely that they are part of a plan of regulation which invades the reserved rights of the States, and offends against the 10th Amendment. The Act provides the means for purchasing compliance which Congress is powerless to command, and for buying with Federal funds submission to Federal regulation of a subject reserved to the States. In reality the farmers are subjected to economic coercion.

Mr. Justice Stone dissented, in a judgment which was concurred in by Justices Brandeis and Cardozo. He denied, as a question of fact, that the Act operated on the farmers by coercion; it operated by inducement; and that is the way in which the expenditure of public money normally acts. "The power of Congress to spend is inseparable from persuasion to action over which Congress has no legislative control" "The spending power of Congress is in addition to the legislative power and not subordinate to it."

"The limitation now sanctioned [by the majority judgment] must lead to absurd consequences. The Government may give seeds to farmers, but may not condition the gift upon [the seeds] being planted in the places where they are most needed, or even planted at all. The Government may give money to the unemployed, but may not ask that those who get it shall give labour in return, or even use it to support their families". . . . "If appropriation in aid of a

programme of curtailment of agricultural production is constitutional, and it is not denied that it is, payment to farmers on condition that they reduce their crop acreage is constitutional. It is not the less so because the farmer at his own option promises to fulfil the condition."

But since the law must be taken to be what the majority said it was, the Agricultural Adjustment Act in its turn received its quietus.

The Guffey Act

The National Recovery Act had been condemned by the Supreme Court, as I have related, on 27 May 1935. Two months later Congress passed an Act popularly known as the "Guffey" Act (after Senator Guffey, who introduced the Bill in the Senate), and officially known as the Bituminous Coal Conservation Act, 1935. The object of this Act was, if possible, to provide a substitute for the National Recovery Act as regards the industry which was perhaps of all others the most in need of regulation, the industry of soft coal-mining. In the words of Mr. Justice Cardozo's dissenting judgment in the Carter case, "over-production in the coal-mining industry was at a point where free competition had been degraded into anarchy. Prices had been cut so low that profit had become impossible for all except a lucky handful. Wages came down along with prices and with profits. There were strikes, at times nation-wide in extent, at other times spreading over broad areas and many mines, with the accompaniment of violence and bloodshed and misery and bitter feeling. . . . During the twenty-three years between 1913 and 1935 there had been nineteen investigations or hearings by Congress or by specially created Commissions with reference to conditions in the coal mines. The hope of betterment was faint unless the industry could be subjected to the compulsion of a code."

You will appreciate that the Guffey Act was passed after the Supreme Court had condemned the peremptory codes of the Recovery Act, but before it had condemned the system of what I may call the purchased or persuasive regulation set up by the Agricultural Act. The Coal Act

accordingly organized a system under which the submission of producers to a Code was to be induced by fiscal privileges, or tax exemptions.

A tax of 15 per cent on the sale price at the mine was imposed on all bituminous coal. But any producer who accepted a Code of regulations framed in accordance with the Act was to be entitled to a drawback of 90 per cent on the amount of the tax. The Codes to be promulgated were to fix minimum prices, and might fix maximum prices; they were to secure to employees the right to organize and to bargain collectively, to assemble peaceably to discuss the principles of collective bargaining, to choose their own checkweighmen, and to be free from any compulsion to occupy company houses or to buy at company stores. Code authority was to attach to maximum hour and minimum wage rates specified by agreement between producers of more than two thirds of the annual output, and more than one half of the employees.

The President signed the Guffey Act on 30 August 1935. Immediately, on the following day, proceedings were begun by one Carter, a principal shareholder in the Carter Coal Company, a great concern operating in West Virginia, to obtain an injunction prohibiting the company from accepting the Code provided for in the Act, and from paying the tax. Nine months later, in May 1936, the Supreme Court, by a six to three majority, gave judgment for Carter and against the Act.[1] The Carter Case

The leading judgment, which was given by Mr. Justice Sutherland, was to the following general effect.

In the first place the 15 per cent impost was not a true tax but, somewhat like the processing tax in the 'Triple A' case, it was a device to induce producers to submit to the Code. The question whether it is constitutional depends therefore upon the constitutionality of the Code itself. The Code has two principal features; the regulation of the conditions of labour, and the regulation of prices. As regards

[1] Carter *v.* Carter Coal Co., 1936.

the regulation of labour conditions, it is contended that the object of these provisions is to promote the national welfare in a field which cannot be adequately covered by State legislation. But this is not a sufficient basis for Federal legislation. In the original Constitutional Convention at Philadelphia, Mr. Randolph proposed that Congress should be empowered to legislate "in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation." But this proposal of Mr. Randolph's was rejected; and in its place we have the 10th Amendment, which expressly reserves to the States or to the people powers not delegated to the United States. Consequently, the Federal regulation of labour conditions in the coal mines must look for its justification, if anywhere, to the Commerce Clause. But the Commerce Clause also proves insufficient, since mining is not inter-State commerce: "Extraction of coal from the mine is the aim and the completed result of local activities."

Then again the power given by the Act to majorities of the producers and of the employees to fix maximum hours and minimum wages, and to impose their decisions upon the minority, is "legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." "A Statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property."

Then finally there is the question whether, the labour provisions being condemned, the price-fixing provisions can nevertheless be rescued. It is true that Section 15 of the Act expressly provides that "if any provision of this Act . . . is held invalid . . . the remainder of the Act shall not be affected thereby." This provision, however, does no more than reverse the presumption that if one part of an

Act is unconstitutional, the whole Act is unconstitutional. But the reversed presumption is still only a presumption; it is not conclusive; and the Court has still to form its own opinion on the question whether Congress can be supposed to have intended that the price-fixing provisions of the Act should stand alone. And this question the Court decides in the negative. Consequently the whole Act is to be condemned.

The Chief Justice, in a separate judgment, agreed with the majority of the Court that the labour provisions were unconstitutional, but held that the price-fixing provisions were separable and valid. On this point he voted with the minority. Mr. Justice Cardozo, supported by Justices Brandeis and Stone, gave a dissenting judgment holding that the price-fixing provisions were a valid regulation of inter-State commerce, that they were separable from the labour provisions, and that they should be upheld, without the necessity for consideration by the Court at that time of the labour provisions.[1]

I have now said all I intend to say about the New Deal laws which have failed to pass muster before the Supreme Court.[2] These defeats have no doubt been of great political and constitutional importance. But serious as have been the conflicts between Congress and the judicial power, I

[1] The Act was repealed and replaced by the Bituminous Coal Act of 1937, designed to meet the criticisms of the Supreme Court. The system of a tax from which producers complying with the "Code" are exempt is retained. But the provisions relating to labour conditions are confined to producers supplying coal to government; the plan for fixing hours and wages by majority agreements between producers and employees is omitted; and maximum and minimum prices fixed by the Commission established by the Act are to govern only inter-State commerce.

[2] A footnote must suffice for the Home Owners' Loan Act, 1933, which was, in part at least, condemned by the Court in Hopkins Federal Savings and Loan Association *v.* O'Leary, 1935, on the ground that it authorized a savings and loan association incorporated under State laws to convert itself into a Federal Corporation by a vote of 51 per cent of the shareholders, without the consent of the State concerned; and that this constituted an unconstitutional invasion of the sovereignty and autonomy of the State.

must not leave you with the impression that the Court has shown itself uniformly hostile to the measures of the Roosevelt Administration. That is not the case.

The Gold Clause Cases

One of the most important of the litigious victories of the Administration was that won in what are known as the Gold Clause Cases, a group of three cases,[1] which were decided on 18 February 1935. These cases turned on the validity and effect of a Joint Resolution[2] passed by Congress on 5 June 1933, which declared that the provision in any contract that the creditor was entitled to be paid in gold, or with an amount of currency measured by gold, was against public policy. The purpose of this Resolution was of course to enable the currency to be cut loose from gold, and therefore to be depreciated in terms of gold, without calling into existence two different kinds of dollars, dollars of account based on gold, and depreciated currency dollars. Creditors holding gold clause obligations objected that the Resolution offended against the 5th Amendment, because the right to be paid in gold or in gold value was a property right, of which they were being deprived without Due Process of law, and without just compensation.

In two of the three cases the debtor was the United States; while in the third the plaintiff was a private individual and the defendant a private corporation; and though in all three cases the judgment of the Court was adverse to the creditor, the reasons given differed. In the case of Norman *v.* the Baltimore and Ohio Railroad Company the Chief Justice ruled that the power expressly given to Congress to regulate the currency could not be impaired or limited by private contracts. All contracts "must be understood as having been made in reference to the possible exercise of the rightful authority of the government." "Parties cannot remove their transactions from the reach of dominant constitutional

Norman *v.* The Baltimore and Ohio R.R. Co.

[1] Norman *v.* Baltimore and Ohio R.R. Co.; Nortz *v.* United States; and Perry *v.* United States.

[2] A Joint Resolution, when approved by the President, has the force of a Statute.

power by making contracts about them." The only question was whether in annulling the gold clauses Congress had adopted an appropriate means of exercising its constitutional power to regulate the currency; and the presumption that Congress knew what it was about had not been rebutted.[1]

Nortz v. U.S.; Perry v. U.S.

The decisions in the two cases in which the United States was defendant were given on very different grounds. In these cases the obligations sued on were government securities expressed to be payable in gold: and as to these the Court ruled that though Congress could not be restrained by the force of private contracts between private persons, it had no power "to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers." The Constitution authorizes Congress to borrow money on the credit of the United States.[2] When Congress exercises this power, it is acting on behalf of the sovereign people; and it cannot thereafter "invoke the sovereign power of the people to override their will as thus declared."[3] There remains therefore only the question, What damages? But in neither case can the plaintiff substantiate a claim to more than nominal damages, since, at the time the claims at issue were put forward, dealings in gold were so strictly controlled by lawful regulations, that a right to gold had no greater value than a claim to devalued currency of the nominal amount of the obligation.

The decisions in the Gold Clause Cases were given by a five to four majority; and the minority registered their disagreement in language of extraordinary vehemence. The dissenting judgment, which was given by Mr. Justice McReynolds, concluded with the words: "Loss of reputa-

[1] The Gold Clause Resolution was again sustained, in a case between private parties, in Holyoke Water-Power Company *v.* American Writing-Paper Company, decided on 1 March 1937.

[2] Article I, § 8.

[3] Why not? Mr. Justice Stone, while agreeing in the result, refused to follow the majority judgment on this point.

tion for honourable dealing will bring us unending humiliation: the impending legal and moral chaos is appalling."

I must mention two other important New Deal Statutes, both of which were passed in the summer of 1935, and both of which emerged alive from attack before the Supreme Court in the earlier months of 1937;[1] that is to say, after Mr. Roosevelt's re-election.

These two Acts are the Federal Social Security Act,[2] and the National Labour Relations Act,[3] commonly known as the Wagner Act, after its sponsor, Senator Wagner.

The Social Security Act

The Social Security Act launched a wide programme of social reform, chiefly in the shape of Federal assistance to the States, both by way of central administrative organization and by way of grants in aid, to promote public health, child welfare, and similar services; but more particularly directed to stimulating the organization by the States of Old Age Pensions[4] and of Unemployment Insurance.[5] In both these cases funds were to be provided by special taxes on employers and employees, proportional to wages paid and received by them. The tax in aid of Unemployment Insurance was laid on employers alone; but they were to receive credit, in respect of that tax, to the extent of 90 per cent of any contribution made by them to an approved State Unemployment relief scheme.

Both plans have been sustained by the Supreme Court.

Steward Machine Co. *v.* Davis

In Steward Machine Company *v.* Davis (1937) five members of the Court, by the mouth of Mr. Justice Cardozo, repelled an attack upon the Unemployment Insurance plan. The attack was based on several grounds, of which the most substantial was that the device of imposing upon the employers in a State a tax from nine-tenths of which they might be relieved if they had contributed a proportionate amount to a State Unemployment Scheme amounted to coercion of

[1] But the fact that certain provisions of a comprehensive Statute have been sustained as constitutional does not necessarily mean that other provisions will be equally successful.

[2] Approved 14 May 1935. [3] Approved 5 July 1935.

[4] Titles II and VIII of the Act. [5] Titles III and IX.

the State in the domain of its reserved powers, and contravened the Xth Amendment. Something very like this had been successfully pleaded in the Hoosac Mills case which torpedoed the Agricultural Adjustment Act; but now there was a new spirit moving, and this time the argument that financial inducement is coercion was unsuccessful. A grant in aid, said the Supreme Court in effect, is not persecution.

The other case on the Social Security Act can be discussed even more briefly. This was the case of Helvering *v.* Davis (1937), in which the provisions unsuccessfully attacked were those relating to old age pensions. The Court held by a seven to two majority that it was not beyond the power of Congress to decide that the award of old age benefits would conduce to the general welfare; and consequently a tax imposed for that purpose was not invalid.

Helvering v. Davis

The National Labour Relations Act, known as the Wagner Act, was passed on 5 July 1935. Its general aim may be said to have been to protect and promote Trade Unionism in industries engaged in inter-State commerce, an object which, as you will remember, the authors of the Recovery Act and of the Guffey Coal Act had also had in view.

The Wagner Act

The Act proclaimed the right of employees to organize and to join labour organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for their mutual aid and protection; and it declared that it should be an "unfair labour practice" for an employer to interfere with the employees' right to organize; to seek to dominate a labour union; to impose "yellow dog" conditions of employment; to discharge an employee for making charges or giving testimony under the Act; or to refuse to bargain collectively with the duly elected representatives of his employees. The administration of the Act is entrusted to a National Labour Relations Board, which has power, on a finding that any employer is engaged in any "unfair labour practice" as defined in the Act, to issue an order requiring the offender

to "cease and desist" from his offence, and "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of the Act." The orders of the Board may be enforced by the Courts.

N.L.R.B. *v.* Jones and Laughlin Steel Corporation

The Constitutionality of the Act was sustained by the Supreme Court in five cases[1] which were decided on the same day, 12 April 1937.[2] The principal judgment was delivered by the Chief Justice in the case of the National Labour Relations Board *v.* the Jones and Laughlin Steel Corporation. In this case it had been found as a fact that the Corporation had dismissed certain employees "because of their Union activity and for the purpose of discouraging membership of the Union." The Board had ordered the reinstatement of the dismissed men; and the Steel Corporation had refused to obey.

The principal argument of the Corporation was that the men who had been dismissed were engaged in the manufacture of steel, and that the manufacture of steel is not inter-State commerce. In point of fact the business of the Corporation, together with its subsidiaries, extended over the whole field from the extraction of iron ore from the mines to the distribution of completed products throughout the United States and Canada. The manufacture of steel at the works where the trouble had arisen was, so the Court held, a central link in a chain of activities which certainly included inter-State commerce; and Congress undoubtedly had the power to legislate against practices which threaten to obstruct or unduly to burden the freedom of inter-State

[1] National Labour Relations Board *v.* Jones and Laughlin Steel Corporation; N.L.R.B. *v.* Fruehauf Trailer Co.; N.L.R.B. *v.* Friedman-Harry Marks Clothing Company, Inc.; Washington, Virginia, and Maryland Coach Company *v.* N.L.R.B.; and The Associated Press *v.* N. L.R.B.

[2] In one case (Washington, Virginia and Maryland Coach Co. *v.* N.L.R.B.) the Court was unanimous in sustaining the Act as applied to inter-State bus transportation. In the remaining cases, where the question was of the validity of the Act as applied to manufacturing industries or to a news service, the Court sustained the Act by five to four majorities.

commerce. In other words, Congress has the constitutional power to legislate for the preservation of industrial peace within a State, when industrial warfare within that State would obstruct inter-State commerce. "When industries organize themselves on a national scale, making their relation to inter-State commerce the dominant factor in their activities, how can it be maintained," asked the Chief Justice, "that their industrial labour relations constitute a forbidden field into which Congress may not enter, when it is necessary to protect inter-State commerce from the paralysing consequences of industrial war?"

In the eyes of the general public the decisions upholding the Social Security Act and the Wagner Act appeared to show that a majority of the Supreme Court, or at any rate two members of the Court, the Chief Justice and Mr. Justice Roberts (enough to change a minority into a majority), had experienced a change of heart in regard to the New Deal.[1] Perhaps they had. Perhaps Mr. Dooley was right when he said that the Supreme Court follows the election returns. But it is not necessary for us as lawyers to indulge in any such speculations. The two main questions upon which the cases which I have summarized—with the exception of the Gold Clause Cases—chiefly turned were, first, how far Congress may go in taxing and spending for the general welfare; and second, how far may it go in the name of the Commerce Clause in regulating business inside a State. Both these questions are questions of degree; and a Court does not necessarily reverse itself when it moves from the right towards the left in questions of degree.

But be that as it may, the earlier decisions unfavourable to the New Deal had revived in an acute form the ancient controversy as to the constitutional powers of the Supreme Court. The President's supporters insisted that it could never have been the intention of the Founders that the

[1] Another striking example of the change of attitude by a majority of the Court is furnished by the Washington Minimum Wage case—West Coast Hotel Company *v.* Parrish (1937). See p. 121.

Court should have the power to condemn an Act of Congress as unconstitutional, unless its unconstitutionality was unquestionable; and that, they said, could hardly be said to be the case when three or perhaps four members out of a Court of nine agreed with both houses of Congress and with the President that the Act was valid.

Various proposals have been canvassed in recent years to remedy this supposed anomaly, as the divergence between right wing and left wing opinion has increased, with conservative opinion apparently enthroned in the Supreme Court. The late Senator La Follette proposed that the Congress should be given power, by constitutional amendment, to overrule the Supreme Court by two thirds majorities.[1] This, like the more extreme proposal that the Court should be wholly deprived of the power to condemn Acts of Congress as unconstitutional, is open to the objection—if it be an objection—that by giving Congress supreme legislative power, it entirely alters the American plan of government, destroys the sovereignty of the States, and in effect repeals the Bill of Rights. And when it is contended that the supremacy of Parliament in England does not appear to result in tyranny, controversialists reply by citing the drastic powers of internment without trial which were vested in Secretaries of State by the Defence of the Realm Act during the War.[2] In 1923 Senator Borah introduced a bill providing that for the Court to hold an Act to be unconstitutional a majority of at least seven to two should be required.[3] This plan the Senator afterwards withdrew, further reflection having satisfied him that regrettable as decisions on constitutional issues by bare majorities might be, the requirement of a greater majority would be even more unsatisfactory.[4] The effect of the seven

[1] Warren, *Congress, the Constitution, and the Supreme Court*, p. 138.

[2] Warren, op. cit., p. 167. To which it might be replied that the exercise of similar powers would be constitutional in America under Martial Law.

[3] Warren, op. cit., p. 179.

[4] Warren, ibid.

to two rule would be that in litigation between two private citizens, one of whom relies upon a Statute and the other upon the Constitution, it would be possible for three judges to veto the unanimous opinion of six of their colleagues to the effect that the party invoking the Constitution ought to win. The Constitution would cease to be the Supreme Law of the land. But this is a very large and controversial subject, and I must pass on.

The most recent and the most notorious proposal for the reform of the Supreme Court was that contained in the bill which was introduced in the Senate by Senator Ashurst in February of last year (1937) on the recommendation of the President. This measure was based upon the simple hypothesis that what was wrong with the Supreme Court was that the judges were too old.[1] And in point of fact, at the time the bill was introduced, six of the nine justices were over seventy years of age. You will appreciate that since the Constitution provides that the judges shall hold office during good behaviour, it was beyond the powers of Congress to establish an age-limit. What the Ashurst Bill proposed was that if any justice of the Supreme Court, having at least ten years' service, and being seventy years of age, should fail to resign within six months, the President should be empowered to increase the membership of the Court by one, and to make an appointment to the new seat; subject to the limitation that the membership of the Court should not be increased beyond fifteen. If the result of the passage of the bill should be that six of the older judges forthwith resigned and took their pensions, the President would of course have the power to replace them, but he would have no power permanently to increase the size of the Court. But for each one of the judges over seventy years of age who failed to resign within the prescribed six months the President would have the power to

[1] Though the cases of Mr. Justice Brandeis and Mr. Justice Holmes cast some doubt upon the suggested connexion between advanced years and hostility to "liberal" views of the Constitution.

create a new and permanent seat upon the Supreme Court bench, up to the limit of six; so that the eventual size of the Court would be determined not by Congress but by the volition of the individual judges and of the President.[1] This curious bill was read a second time and referred to the Judiciary Committee of the Senate. It excited lively opposition in the profession, and in the country at large; and in spite of the fact that by a large majority the Committee was composed of Democrats, members of the President's party, it reported, after hearing some eighty witnesses, adversely to the bill. The adverse report was signed by seven Democratic Senators and three Republicans.

[1] The bill contained analogous provisions relating to the inferior Federal Courts.

ADDITIONAL NOTES

I. Does the Constitution follow the Flag?

In the contemplation of its authors, the Constitution was made for the government of the political society composed of the citizens of the original States, and of such further States as might be created in the future. It did not specifically provide for the status of persons who might owe allegiance to the United States without being citizens of any State. But this category of persons was brought into existence contemporaneously with the coming into force of the Constitution—if indeed it may not be said to have been in existence even earlier. For before the Constitution was adopted, while the States were united only in the Confederation, the Union as such had acquired territorial possessions by the operation of the cession made to it by the States of Virginia, New York, Connecticut, and Massachusetts of the North-West Territory—the territory lying between the Ohio river, the Mississippi and the Great Lakes, out of which the States of Ohio, Indiana, Illinois, Michigan and Wisconsin were afterwards carved.

Then the Constitution itself provides for the exercise by Congress of exclusive legislative power "over such district (not exceeding ten miles square) as may, by cession of particular States . . . become the seat of the Government of the United States." And effect was forthwith given to this clause by the cession to the Federal Government by the State of Maryland of the territory known as the District of Columbia, in which stands the City of Washington.

Thereafter, between the years 1803 and 1853, the United States acquired the whole of the remaining territory out of which the existing 48 States have been carved. All this country, which means the whole of the domain now constituted as States, with the exception of the original

States, and Maine, West Virginia, Texas, and California,[1] passed through the novitiate status of "territories" in the technical sense, which means country subject to American sovereignty which is politically intermediate in status between a State and a mere dependency.

Alaska was purchased from Russia in 1867, and Hawaii was annexed in 1898. These are still "territories," and they are the only remaining "territories." In 1898, by the treaty of peace with Spain, the United States acquired the Philippine Islands and Porto Rico.[2]

It was the acquisition of the insular possessions of Spain which stirred the hitherto dormant question whether the mere fact that a country had been brought under the American flag was sufficient to make its inhabitants citizens, to attract the application of the Constitution, and in short to "incorporate" it with the Union and make it a "territory." In the case of the continental territories which have been made into the existing States it seems never to have been doubted that the inhabitants were citizens *ab initio*, and that the Constitution followed the flag. Acquisition was thought to be equivalent to incorporation.

Hawaii, which was annexed in 1898, was "incorporated," and made a "territory" by an Act of Congress of 1900, which formally extended the Constitution to the islands. In the case of Hawaii *v.* Mankichi (1903) the Supreme Court held that in the interval between annexation and incorporation the right to jury trial was not guaranteed, although former citizens of the Republic of Hawaii had already, by the annexation Resolution, become citizens of the United States.

On the other hand in Rassmussen *v.* the United States (1905) it was held that although Alaska had at that time not yet been organized as a "territory,"[3] it had been "incorporated" by the treaty of cession, which expressly

[1] Maine and West Virginia were carved respectively out of the lands of Massuchusetts and Virginia, while Texas and California were admitted directly to the Union as full-blown States.

[2] Also the island of Guam. In 1900 the United States acquired American Samoa; in 1904 the Canal Zone, through which passes the Panama Canal; and in 1917 the Virgin Islands, by purchase from Denmark.

[3] This was not done until 1912.

provided that "the inhabitants of the ceded territory shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and shall be maintained in the free enjoyment of their liberty, property and religion." Consequently an Act of Congress which had dispensed with Common Law juries of twelve in criminal trials was held to be unconstitutional. Chief Justice Taft, in the case of Balzac *v.* Porto Rico (1922) said: "before the question became acute at the close of the Spanish war, the distinction between acquisition and incorporation was not regarded as important, and had not aroused great controversy. Before that, the purpose of Congress might well be a matter of mere inference from various legislative Acts; but in these latter days, incorporation is not to be assumed without express declaration, or an implication so strong as to exclude any other view." In the last mentioned case the Supreme Court decided that in spite of the fact that the "Jones" Act of 1917, which organized the government of Porto Rico, practically conferred United States citizenship upon the inhabitants of the island (permitting them, among other things, to settle and to vote in the States without naturalization), that Act had not had the effect of "incorporating" the island; with the result that the guarantee of jury-trial contained in the Constitutional "Bill of Rights" could not be invoked by a Porto Rican indicted for criminal libel.[1] But "the guaranties of certain fundamental personal rights declared in the Constitution, as for instance that no person can be deprived of life, liberty, or property without Due Process of law, had from the beginning full application in the Philippines and in Porto Rico."[2] It would seem that the slavery amendment, and the constitutional prohibitions relating to religious opinion, personal liberty, freedom of speech, access to the Courts, equal protection of the laws,

[1] It would seem clear that while annexation is an act which Congress can reverse—as it has done in the case of the Philippine Islands—it would not be open to Congress to reverse an Act of incorporation, at any rate not without the consent of the territory. The Philippine legislature, after at first refusing independence, accepted it in 1934. But it may be doubted whether this was constitutionally necessary.

[2] Taft, C. J., in Balzac *v* Porto Rico.

searches and seizures, and cruel and unusual punishments are likewise applicable in unincorporated territory.[1]

Speaking generally the Constitution has full effect in the incorporated territories—including in that term the District of Columbia. So Congress cannot impair the right to jury-trial in a territory,[2] though a State legislature is free to do so for its own courts.[3]

It was decided long ago by Chief Justice Marshall that, for the purpose of the provision of the Constitution that the Federal Courts have general jurisdiction in suits between citizens of different States, the District of Columbia is not a State—so that a resident in that district is not entitled to rely upon diversity of citizenship to bring a suit against a citizen of Virginia before the Federal Court.[4] On the other hand the District of Columbia is a "State" within the terms of a treaty with France of 1853 which secured to French citizens the right to inherit realty in "all the States of the Union."[5]

II. Direct taxes and the income tax.

The Constitution provides[6] that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

The authors of the Constitution were not, it seems, very clear as to the meaning they attached to the term "direct tax,"[7] and the question long remained a matter of controversy. Upon its solution depended the question whether the particular tax in issue could be lawfully imposed without being apportioned among the States in proportion to their respective populations.

[1] Willis, p. 262. The Prohibition Amendment, though expressed to be applicable to "all territory subject to the jurisdiction" of the United States, was never put in force in the Philippines.

[2] Callan *v.* Wilson (1888); American Publishing Co. *v.* Fisher (1897).

[3] Maxwell *v.* Dow (1900).

[4] Hepburn and Dundas *v.* Ellzey (1805).

[5] Geoffroy *v.* Riggs (1890). [6] Article I, § 9.

[7] *Cyclopædia of American Government*, Vol. III, p. 507.

In Hylton *v.* the United States (1796) the Supreme Court held that a tax on "all carriages for the conveyance of persons" was not a direct tax, and was therefore governed, not by the principle of equal apportionment, but by the rule of uniformity, applicable to all "duties, imposts, and excises."[1] "A tax on carriages [could] not be laid by the rule of apportionment without very great inequality and injustice," since under that rule the tax payable by each carriage-owner would depend upon the ratio of carriages to population in each State, and would be inversely proportioned to that ratio. "A tax on expense is an indirect tax. Only capitation taxes and taxes on land are direct taxes."[2]

In Veazie Bank *v.* Fenno (1869) the Court held that a 10 per cent tax on the amount of notes issued by banks was not a direct tax; and Chief Justice Chase asserted again that only taxes on land and capitation taxes should, for the purposes of the Constitution, be regarded as direct taxes. And in Springer *v.* the United States (1881) it was held that a Federal tax on income (derived in the instant case from professional earnings and from interest in United States bonds) was "within the category of an excise or duty," and was therefore valid though not apportioned.

But in 1895, in the case of Pollock *v.* the Farmers' Loan and Trust Company, the Supreme Court decided that an income tax imposed by an Act of 1894 was unconstitutional, on the ground that a tax on income is a tax on the property from which it is derived; and that a tax whether on real or personal property is a direct tax.[3]

It was not until 1913 that on the recommendation of President Taft the 16th Amendment was adopted, which empowered Congress "to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

[1] Article I, § 8.

[2] Hamilton, in *The Federalist* (Nos. 21 and 36), is quite clear that by indirect taxes are meant taxes upon articles of consumption.

[3] "Probably no other case, with the exception of the Dred Scott case forty years before, was so widely discussed or received so unfavourable comment." McLaughlin, p. 763.

III. Ex post facto laws.

Both the Congress[1] and the States[2] are forbidden to pass *ex post facto* laws.

So long ago as 1798 it was decided in Calder *v.* Bull that this prohibition applies only to criminal legislation. In this case the Probate Court of Hartford, Connecticut, had refused probate of the will of one Normand Morrison. Two years later the State legislature passed a resolution or law setting this decree aside, and granting a new hearing by the Court, with liberty to appeal. A rehearing or an appeal was accordingly had, with the result that the disputed will was affirmed, and a property right which had vested in Calder was divested from him and vested in Bull. The Supreme Court held that the Act did not offend against the constitutional prohibition.

And in Cummings *v.* Missouri (1867) Field, J. said "by an *ex post facto* law is meant one which imposes a punishment for an Act which was not punishable at the time it was committed; or which imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required."[3]

Kring *v.* Missouri (1883) is an interesting case on this subject. Before the year 1875 there existed in the State of Missouri a well recognized rule of criminal practice under which, if a prisoner under indictment for murder in the first degree agreed with the State's attorney to plead guilty to murder in the second degree, the acceptance of that plea constituted an absolute bar to a conviction for

[1] Article I, § 9. [2] Article I, § 10.

[3] In the opinion of Professor Willis (op. cit., p. 515), "it was undoubtedly the intention of the framers of the Constitution to make the *ex post facto* clause apply to civil as well as to criminal legislation." This view is borne out by Madison's paper in *The Federalist*, No. 44, where he couples together bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts. "The sober people of America . . . have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, became jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community."

murder in the higher degree. This rule was regarded as pertaining to the law of evidence—a species of estoppel. Kring was indicted for a murder committed on 4 January 1875; but before his trial the rule in question was abrogated by the new Constitution of the State, adopted on 30 November 1875. Nevertheless Kring pleaded guilty to murder in the second degree, the prosecution accepted the plea, and the Court sentenced the prisoner to 25 years imprisonment. Thereafter Kring was brought to trial again on the major charge, and sentenced to be hanged for murder in the first degree. The Supreme Court quashed the conviction on the ground that the rule invoked by the prisoner was in force at the time the crime was committed, and that it could not, under the *ex post facto* principle, be abrogated thereafter to his disadvantage. Four Justices, including Waite, C.J., dissented, on the ground, stated by Matthews, J., that at the time the crime was committed the fact on which the prisoner sought to base the application of the *ex post facto* principle—namely the plea of guilty in the second degree accepted by the prosecution, was not yet in existence; and that that fact was brought into existence by the prisoner himself (with the consent of the State), after the rule as to its absolutory effect had been abolished.

THE CHIEF JUSTICES OF THE SUPREME COURT

John Jay	1789–1795
John Rutledge	1795–1795
Oliver Ellsworth	1796–1800
John Marshall	1801–1835
Roger B. Taney	1836–1864
Salmon P. Chase	1864–1873
Morrison R. Waite	1874–1888
Melville W. Fuller	1888–1893
Edward D. White	1910–1921
William H. Taft	1921–1930
Charles E. Hughes	1930–

THE CONSTITUTION OF THE UNITED STATES

We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

SECTION I

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION II

The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

No person shall be a Representative who shall not have attained the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years

after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of *New Hampshire* shall be entitled to choose three, *Massachusetts* eight, *Rhode Island and Providence Plantations* one, *Connecticut* five, *New York* six, *New Jersey* four, *Pennsylvania* eight, *Delaware* one, *Maryland* six, *Virginia* ten, *North Carolina* five, *South Carolina* five, and *Georgia* three.

When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

The House of Representatives shall choose their Speaker and other officers, and shall have the sole power of impeachment.

SECTION III

The Senate of the United States shall be composed of two[1] Senators from each State, chosen by the legislature thereof, for six years; and each Senator shall have one vote.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year; of the second class, at the expiration of the fourth year; and of the third class, at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation or otherwise during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

[1] Amended by 17th Amendment.

The Senate shall choose their other officers, and also a President *pro tempore* in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: and no person shall be convicted without the concurrence of two-thirds of the members present.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trials, judgment, and punishment, according to law.

SECTION IV

The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION V

Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each house may provide.

Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds, expel a member.

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as

may in their judgment require secrecy, and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.

Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SECTION VI

The Senators and Representatives shall receive a compensation for their services,[1] to be ascertained by law and paid out of the Treasury of the United States. They shall, in all cases except treason, felony, and breach of the peace be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place.

No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

SECTION VII

All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

Every bill which shall have passed the House of Representatives and the Senate shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall

[1] This "compensation" is now fixed at $10,000 per annum, and is the same for both houses.

likewise be reconsidered, and if approved by two-thirds of that house it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION VIII

The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations and among the several States, and with the Indian tribes;

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post-offices and post-roads;

To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas and offences against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

SECTION IX

The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or ex post facto law shall be passed.

No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

No tax or duty shall be laid on articles exported from any State.

No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the Treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind, whatever, from any king, prince, or foreign State.

SECTION X

No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as will not admit of delay.

ARTICLE II

SECTION I

The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and together with the Vice-President, chosen for the same term, be elected as follows:

Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[The electors shall meet in their respective States and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should

remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.][1]

The Congress may determine the time of choosing the electors and the day on which they shall give their votes, which day shall be the same throughout the United States.

No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed or the President shall be elected.

The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he may have been elected, and he shall not receive within that period any other emolument from the United States or any of them.

Before he enter on the execution of his office he shall take the following oath or affirmation:

"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability preserve, protect, and defend the Constitution of the United States."

SECTION II

The President shall be Commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States; he may require the opinion, in writing, of the princi-

[1] This clause of the Constitution has been amended. See twelfth article of the amendments.

pal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments.

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION III

He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION IV

The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

ARTICLE III

SECTION I

The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

SECTION II

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SECTION III

Treason against the United States shall consist only in levying war against them, or in adhering to their enemies,

giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted.

ARTICLE IV

SECTION I

Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

SECTION II

The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

SECTION III

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or

other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State.

SECTION IV

The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

ARTICLE V

The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendments which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI

All debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the Confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the

Constitution or laws of any State to the contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

AMENDMENTS[1]

ARTICLE I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II

A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III

No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

[1] The first ten Amendments came into effect 3 November 1791.

ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

ARTICLE V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when on actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

ARTICLE VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

ARTICLE XI[1]

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

ARTICLE XII[2]

The electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice-President, and of the number of votes for each; which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted. The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and

[1] In effect 8 January 1798. [2] In effect 25 September 1804.

if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Repretatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.

The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

ARTICLE XIII[1]

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV[2]

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the

[1] In effect 18 December 1865. [2] In effect 28 July 1868.

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV[1]

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, colour, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XVI[2]

SECTION 1. The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

ARTICLE XVII[3]

SECTION 1. The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislatures.

SECTION 2. When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided that the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the Legislature may direct.

SECTION 3. This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

[1] In effect March 30, 1870.
[2] In effect Feb. 25, 1913.
[3] In effect May 31, 1913.

ARTICLE XVIII[1]

SECTION 1. After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited.

SECTION 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission thereof to the States by the Congress.

ARTICLE XIX

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XX[2]

SECTION 1. The terms of the President and Vice-President shall end at noon on the twentieth day of January, and the terms of senators and representatives at noon on the third day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

SECTION 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the third day of January, unless they shall by law appoint a different day.

SECTION 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the

[1] In effect 17 January 1920. [2] In effect 6 February 1933.

Vice-President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice-President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice-President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be elected, and such person shall act accordingly until a President or Vice-President shall have qualified.

SECTION 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any other persons from whom the Senate may choose a Vice-President whenever the right of choice shall have devolved upon them.

SECTION 5. Sections one and two shall take effect on the fifteenth day of October following the ratification of this article.

SECTION 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

ARTICLE XXI[1]

SECTION 1. The eighteenth article of amendment to the Constitution is hereby repealed.

SECTION 2. The transportation or importation into any State, Territory or Possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution within seven years from the date of the submission thereof to the States by the Congress.

[1] In effect 5 December 1933.

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